

Volume 1

Pages 1 - 211

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

FEDERAL TRADE COMMISSION,

Plaintiff,

VS.

MICROSOFT CORPORATION, et al.,

Defendants.

NO. C 23-02880 JSC
SEALED PAGES 5-14

San Francisco, California
Thursday, June 22, 2023

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS

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United States District Court - Official Reporter

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I N D E X

Wednesday, June 22, 2023 - Volume 1

PAGE VOL.

Opening Statement by Mr. Weinberger 15 1
 Opening Statement by Ms. Wilkinson 32 1

PLAINTIFF'S WITNESSESPAGE VOL.BOOTY, MATT

(SWORN) 48 1
 Direct Examination by Ms. Callan 49 1
 Cross-Examination by Mr. Kilaru 69 1
 Redirect Examination by Ms. Callan 82 1
 Recross-Examination by Mr. Kilaru 86 1

HINES, PETER

(SWORN) 87 1
 Direct Examination by Ms. Fleury 88 1
 Cross-Examination by Ms. Hill 103 1
 Redirect Examination by Ms. Fleury 115 1
 Recross-Examination by Ms. Hill 121 1

DEFENDANTS' WITNESSESPAGE VOL.BOND, SARAH

(SWORN) 124 1
 Direct Examination by Ms. Wilkinson 125 1
 Cross-Examination by Ms. Fleury 186 1
 Redirect Examination by Ms. Wilkinson 208 1

E X H I B I T STRIAL EXHIBITSIDEN EVID VOL.

1184 176 1
 1211 178 1
 1212 172 1
 1442 68 1
 1754 118 1

I N D E XE X H I B I T STRIAL EXHIBITSIDENEVIDVOL.

1784		207	1
3019		171	1
3024		181	1
3025		181	1
3027		183	1
4351		66	1
4352		69	1
4391		120	1
4406		102	1
4408		121	1
5044		136	1
5045		76	1
9186A		97	1
9186		106	1

SEALED PROCEEDINGS

Wednesday - June 22, 2023

8:15 a.m.

P R O C E E D I N G S

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(The following pages 5 through 14 were placed under
seal by Order of the Court and bound separately:)

THE CLERK: All rise. This court is now in session.
The Honorable Jacqueline Scott Corley presiding.

(Pause in proceedings.)

THE CLERK: Please be seated.
Calling Civil Action C 23-2880, FTC vs. Microsoft.
Counsel, please come up to the podium and speak directly
into the mic if you want to make your appearances or --

THE COURT: Do we need to make appearances? Yeah. Do
we need to make appearances?

THE CLERK: No, they don't need to.

THE COURT: Okay. All right. Good morning.
Thank you so much for your submission.

So we are now in closed session. So look around the
courtroom. If there's someone here that you think shouldn't be
here, speak now or -- okay.

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6 **THE COURT:** Okay. All right. We will take a moment
7 and open the courtroom, and then we will begin with our
8 openings.

9 (Recess taken at 8:28 a.m.)

10 (Proceedings resumed at 8:34 a.m.)

11 (The following proceedings were heard in open court:)

12 **THE CLERK:** Remain seated and come to order.

13 (Pause in proceedings.)

14 **THE COURT:** Okay. We don't have to recall the case.

15 One thing about scheduling, I do want to let you know that
16 on Wednesday, June 28th, we can actually commence at 8:30.
17 Ms. Means moved my criminal calendar so we can start at 8:30 on
18 the 28th.

19 Okay. All right. We're now ready to proceed with the
20 evidentiary hearing. We're going to begin with opening
21 statements, and we'll start with the FTC.

22 **MR. WEINGARTEN:** Good morning, Your Honor. James
23 Weingarten. I have a few slides, which I will hand to the
24 deputy, if that's all right, Your Honor.

25 **THE COURT:** Yes.

OPENING STATEMENT / WEINGARTEN

1 **MR. WEINGARTEN:** Some of them contain information
2 that's been marked confidential. Since we're not seeking to
3 admit them, I will talk around them this morning and Your Honor
4 will have them.

5 **THE COURT:** Great.

6 (Pause in proceedings.)

7 **THE COURT:** Okay.

8 **OPENING STATEMENT**

9 **MR. WEINGARTEN:** Good morning, Your Honor. Again,
10 James Weingarten on behalf of the Federal Trade Commission.

11 Microsoft sells the Xbox video game console and also
12 offers the Game Pass subscription service and the xCloud cloud
13 gaming service.

14 Charles, could you put Slide Number 2 on the screen,
15 please?

16 Activision Blizzard makes some of the most successful
17 video game content in history. If this deal is completed, the
18 combined company will have and is likely to have the ability
19 and incentive to harm competition in various markets relating
20 to consoles, subscription services, and cloud.

21 Now to take a step back to the gaming industry,
22 Your Honor, in the gaming industry AAA video game content,
23 those are the most expensive games to develop. Those are the
24 games that are the most highly anticipated. They're the games
25 that make the most money.

24 And Microsoft has been very clear what they mean by
25 "differentiated." That's on the next slide at Slide 3, which

OPENING STATEMENT / WEINGARTEN

1 we won't put up because it's been marked confidential, but
2 we'll address that, of course, when we move to admit.

3 But if you look at the categories there, Your Honor,
4 "differentiated" has a meaning. And if you look at the three
5 components of being differentiated, if it's not differentiated
6 in those three ways, then it's not going to give gamers a
7 reason to prefer your console, your subscription service, or
8 your cloud service over your competitors' offerings.

9 Now, we're going to talk today about the law, the facts,
10 and the equities, and all of them favor entering the requested
11 injunction.

12 So first, Your Honor, very briefly on the law, I want to
13 touch it because the posture of this case is different than the
14 usual preliminary injunction hearing.

15 Now, this case is not about deciding whether this deal
16 should go forward ultimately. The deal does not automatically
17 terminate after July 18th. That's just the option date for the
18 parties to either renegotiate or walk away, but it does not
19 automatically terminate.

20 Even if the Defendants would abandon the deal if
21 Your Honor ruled and granted the preliminary injunction, that's
22 legally irrelevant. It can't save a flawed deal for the
23 parties to say, "Well, we're going to walk if the injunction is
24 granted."

25 And ultimately, I should note, Your Honor, whether this

OPENING STATEMENT / WEINGARTEN

1 deal goes forward hinges as well on what happens in the
2 United Kingdom where that process is going to play out past
3 July 18th.

4 What this case is about is not whether the deal should
5 ultimately close. This case is about whether the Federal Trade
6 Commission should have its chance in the administrative
7 proceeding that Congress set up to evaluate the antitrust
8 merits.

9 **THE COURT:** Before the deal closes.

10 **MR. WEINGARTEN:** Before the deal closes.

11 **THE COURT:** Right. Because it could still do it even
12 if the deal closes.

13 **MR. WEINGARTEN:** We could, Your Honor.

14 **THE COURT:** All right.

15 **MR. WEINGARTEN:** We could but there is a risk, of
16 course. And one can only imagine the equities arguments that
17 the Defendant would employ if there was an attempt to remedy
18 any illegal deal after it closed and the HR department was
19 consolidated and the strategies had changed, et cetera.

20 The evidence we're going to put forward over the next
21 several days, Your Honor, is but a fraction of the total
22 evidence we've accumulated in the course of the discovery that
23 we've had, and the parties have been working at a breakneck
24 pace to get that ready for the administrative proceeding.

25 But even with just that fraction of the evidence, we're

OPENING STATEMENT / WEINGARTEN

1 going to more than meet our burden to raise the substantial
2 questions about relevant market and about the anticompetitive
3 harms that this deal will cause.

4 So I'll turn to the facts, Your Honor.

5 (Pause in proceedings.)

6 **MR. WEINGARTEN:** Charles, can you please put up
7 Slide 5?

8 We're going to define for Your Honor relevant antitrust
9 markets. The point of defining a relevant antitrust market is
10 to determine where the competitive effects of this transaction
11 are going to be felt.

12 That's how we're going to analyze whether there's going to
13 be harm because we have to define a locus of competition that
14 this deal is going to affect, and that will enable an analysis
15 of: Okay. Is there going to be harm in that market?

16 And we're going to use all of the methods that are laid
17 out here, including the quantitative, the qualitative that come
18 from the Supreme Court's *Brown Shoe* test to establish multiple
19 relevant antitrust markets.

20 Now, to succeed the FTC only has to prove one, but we have
21 in this case multiple because Xbox Microsoft gaming offers
22 products and services in multiple markets. And you'll see as
23 our economist testifies, he starts with the product in question
24 and expands outward to try and understand where is the locus of
25 competition with respect to that Microsoft product that's going

OPENING STATEMENT / WEINGARTEN

1 to be affected by this deal.

2 Can you put up Slide 6, please?

3 Now, the first market is the high-performance console
4 market. The most advanced video game systems, consoles, on the
5 market are called Generation 9 consoles, and we brought them
6 here.

7 So this is the Xbox Series X (indicating). This is the
8 Xbox Series S (indicating). This is the PlayStation 5
9 (indicating). Those are Generation 9 consoles. They look like
10 what one imagines a video game console looks like. They plug
11 into a TV and you play your games.

12 Those consoles launched in 2020 roughly around the same
13 time. Microsoft and Sony benchmark these consoles against each
14 other in terms of price, in terms of features, in terms of
15 content.

16 Now, the Nintendo Switch is not a console like the others.
17 Nintendo launched the Switch three years before in 2017. It is
18 not considered a Generation 9 console. It's an 8. It's an 8
19 and a half. It's not a 9. It's a different animal and does
20 not have the same technological capabilities and it competes
21 along different axes than the Generation 9 consoles, and you're
22 going to hear testimony and documentary evidence to that
23 effect.

24 To be clear, Your Honor, among the documents you're going
25 to hear is that Microsoft leadership itself routinely looks at

OPENING STATEMENT / WEINGARTEN

1 a Generation 9 console market that excludes the Nintendo Switch
2 expressly.

3 So we're not going to put it on the screen; but if you
4 look at Slide 7, Your Honor, Plaintiff's Exhibit 1240, it's a
5 page taken from a report that goes to the senior gaming
6 leadership. We've called out multiple sections, but this is
7 their dashboard, for lack of a better word. And you'll see,
8 Your Honor, we've highlighted where it talks about Gen 9 core
9 consoles and it talks about the Series X and S and the
10 PlayStation 5; and it views share and information about those
11 three, and then separately it looks at a total console market,
12 which includes the Switch. That's how the leadership thinks
13 about it.

14 If Your Honor turns the page to Slide 8, this is a
15 document that goes to the senior leadership team of all of
16 Microsoft. This document tracks a Generation 9 console share,
17 and they're very thorough. They include footnotes to explain
18 the data so the senior leaders know what's being discussed, and
19 the footnote says Nintendo Switch and Gen 8 consoles are
20 excluded because the locus of competition for the Xbox X and S
21 is the PlayStation 5.

22 Now, even, Your Honor, even if the market is broad enough
23 to include all four of these and it's all the video game
24 consoles that a person can buy, even if that's a relevant
25 market, the FTC still wins on proving a relevant market and on

OPENING STATEMENT / WEINGARTEN

1 showing that there are anticompetitive harms in that market.

2 We're very confident that the high-performance market is
3 the correct way to view this; but to be very clear, even if
4 Switch is included, we still meet our burden.

5 Now, Defendants are going to try to convince the Court
6 that in addition to these four devices here, the market
7 includes high-performance gaming PCs. Those are special-built
8 computers that people spend a lot of money, I gather, to buy to
9 play video games; but the evidence is going to show,
10 Your Honor, that gaming PCs are not in the same market. The
11 price of a gaming PC or the high-end graphics chips that a
12 person buys to put into a PC, that is not an effect on the
13 price of these console -- these devices set in use and they
14 compete on different characteristics.

15 Microsoft's own market analysis has concluded that PC is
16 not a, quote, "real competitor" to Xbox and PlayStation
17 consoles.

18 I want to turn to our next market, Your Honor. Multigame
19 consoles -- strike that -- multigame library subscription
20 services. That's on page 10.

21 Charles, you can put 10 up on the screen, please.

22 Now, these services, multigame content library services,
23 allow gamers to subscribe like Netflix. You pay a monthly fee
24 instead of buying each of your games and you get to download or
25 stream the games that are available in the library.

OPENING STATEMENT / WEINGARTEN

1 Now, needless to say, the value of such a service depends
2 a lot on what's in your library. The service is not going to
3 be a service that gamers are going to want if it doesn't have
4 the games gamers want to play.

5 So that, again, is where content comes in. Microsoft is a
6 significant player in the content library subscription service.
7 Its product is called Game Pass.

8 Now, Defendants are going to argue that subscription
9 services are not a market, that subscription is just another
10 way to buy a traditional individual video game. And they're
11 going to tell us -- they're going to tell the Court that
12 subscription services cannibalize traditional game sales. That
13 gamers sign up for a subscription, then they don't buy games as
14 much and, therefore, that's an indicia that they compete with
15 each other and the market should include traditional games too.

16 Well, that's not what Microsoft executives tell developers
17 when they're trying to get them to sign up for Game Pass and
18 put their games in Game Pass. So Your Honor is going to see
19 documents and testimony about what they tell the developer
20 community. And the answer is not simply that there's
21 cannibalization.

22 In fact, Microsoft touts that Game Pass is additive and
23 they tell game developers: If you put your game on Game Pass,
24 you're going to increase revenues and sales because gamers will
25 be more able to explore and discover your game potentially.

OPENING STATEMENT / WEINGARTEN

1 Now, on the right-hand side of the slide is the market for
2 cloud streaming services.

3 Now, cloud gaming services and cloud streaming services
4 offer gamers the ability to play games via the cloud. So
5 instead of buying the game, you know, in a physical form or
6 even downloading it to your Xbox or your PlayStation 5 and
7 playing it, this one all the processing is done in the cloud in
8 servers and GPUs elsewhere, and it's streamed to you.

9 Now, Microsoft service there is called Game Pass Ultimate,
10 also xCloud, a couple of different names. You're most likely
11 to hear it as xCloud or Xbox Cloud Gaming.

12 Now, what the cloud enables because the processing is
13 taken out of the local situation, you could have a MacBook, you
14 could have a cheaper PC, you could have a tablet and you can
15 stream the game because you don't need that high-end processor
16 in your device. That's being taken care of in the cloud.

17 Now, we expect that Defendants' executives and personnel
18 are going to come to court and tell the Court that cloud is
19 maybe promising but there are lots of technical issues and it
20 doesn't quite work. And there's a thing called latency. You
21 push the button and it has to go through the cloud and come
22 back, and so your character doesn't move as fast as it should.
23 That's called latency.

24 Well, we're going to bring two executives via video
25 deposition from Nvidia. Nvidia is also a major player in cloud

OPENING STATEMENT / WEINGARTEN

1 streaming. Those two executives are going to testify about the
2 promise of cloud gaming, about having overcome technical
3 limitations, and that cloud streaming is the future.

4 What's notable, Your Honor, is Nvidia initially opposed
5 this transaction. They signed one of the side deals that I'm
6 sure Ms. Wilkinson is going to talk to you about. Then they
7 supported the transaction. But even though they support the
8 transaction, their testimony is, Your Honor will find accurate
9 and truthful, that cloud streaming is real; that it is a real
10 product, a real service; that it's nascent, it's early going
11 but that this market is poised to become an important market
12 for gamers and that the technical limitations have been
13 overcome in many ways.

14 Now, finally, Your Honor, these two markets, the library
15 market and the cloud streaming market, they can also be
16 combined into one market. That's yet another relevant market
17 here. The law allows for submarkets, and it makes sense
18 because some of these services offer both aspects. So if you
19 sign up for Microsoft Game Pass, you got a library of games.
20 If you sign up for the Game Pass Ultimate tier, you get the
21 cloud streaming and the library.

22 So Dr. Lee will talk a lot about how those products and
23 services interact and he'll talk about which ones constrain the
24 other.

25 Now, we also have to prove, as part of showing a relevant

OPENING STATEMENT / WEINGARTEN

1 market, the geographic market. Maybe Defendants are planning
2 to tell Your Honor that it's a worldwide market, but we're
3 going to show you, Your Honor, that Microsoft analyzes this
4 market country by country and they focus in particular on the
5 United States.

6 So if you look at Slide 11, Your Honor, same dashboard
7 again, PX1240, you'll see in the bottom right-hand corner we've
8 highlighted "Microsoft analyzes share specifically for the
9 United States."

10 And if you look, Your Honor, at the next slide, PX1752,
11 this is an e-mail from the CEO of Microsoft Satya Nadella to
12 the CFO of all of Microsoft, and you'll see there what
13 Mr. Nadella has to say about the U.S. market.

14 Now, we're going to talk, Your Honor, today and we're
15 going to bring evidence for Your Honor about the ability and
16 incentive of the combined company.

17 On ability, it suffices to say that once Microsoft owns
18 this content, they own it. They will have the ability to
19 withhold it, but they also will have the ability to raise
20 rivals' prices, they can change the terms and conditions of
21 access to Activision content, or they can degrade Activision
22 content on their rivals' products and services.

23 I think Defense Counsel is going to talk to you a lot
24 about pulling games off of services. That's total
25 foreclosure -- right? -- let's take the game away. But that's

OPENING STATEMENT / WEINGARTEN

1 not the only possible harm here. This is also about what's
2 called partial foreclosure, the myriad of strategies that are
3 available to the combined company to affect its rivals.

4 If this game has a neat player or a tool or a thing you
5 can buy, maybe you can only buy it if the game is on Xbox and
6 you can't buy the same thing if you're playing that game on
7 Sony. That's partial foreclosure. Or maybe gamers of course
8 want to play the game right away, so the game is available
9 first on Xbox and maybe it only comes to PlayStation or to a
10 rival cloud service a year later.

11 So those are all forms of foreclosure. So please don't,
12 Your Honor, take the red herring of thinking this case is about
13 whether a game is just going to be completely yanked from a
14 rival. That's not the only possible harm. That's not the only
15 likely harm.

16 Now a word on incentives, Your Honor. Defendants are
17 going to talk a lot about case-by-case decisions, about going
18 exclusive, because they have a lot of exclusives at Microsoft,
19 games that are for the Microsoft Xbox Echo system.

20 Now, every time they talk about case by case, that also
21 means that if the right strategic imperative comes along, they
22 can override and decide: You know, in this case let's go
23 exclusive. So when they present case by case as a defense, we
24 think case by case indicates exactly so; when your incentives
25 align, you'll make a case-by-case determination to hurt your

OPENING STATEMENT / WEINGARTEN

1 rivals.

2 But even more importantly, Your Honor, Microsoft has told
3 this story before about case-by-case decisions, about getting
4 games as widely available as they can, and that's where ZeniMax
5 comes in, Your Honor.

6 In 2020 ZeniMax offered roughly \$7 billion -- Microsoft
7 offered roughly \$7 billion to acquire ZeniMax, another
8 publisher of AAA games.

9 And if you look at page 13 of the slides, Your Honor, this
10 is what -- a reproduction of a request for admission in this
11 case and Microsoft reproduced a letter that it sent to the
12 Federal Trade Commission when the Federal Trade Commission was
13 reviewing the ZeniMax deal, and you can see what that letter
14 says. It sounds similar to what they're saying now.

15 But what happened, Your Honor, after the deal closed and
16 Microsoft completed its acquisition in 2021, a decision was
17 made that future ZeniMax games would not be decided case by
18 case; that they would be Microsoft Xbox exclusives.

19 Now, you're going to hear that there was a meeting, a
20 series of meetings, and analysis that all led to that decision;
21 and you're going to hear that some people, Microsoft gaming
22 CEO, don't remember a lot about those meetings, but you're
23 going to hear other testimony and other documents that
24 memorialize that decision.

25 And I'll just show Your Honor briefly, if you could look,

OPENING STATEMENT / WEINGARTEN

1 please, at Slide 14, PX4334. This is a chat transcript from
2 November of 2021. This is between Mr. Stuart, Microsoft gaming
3 CFO, and his subordinate in finances Ms. Jamie Lawver. Take a
4 look at the bottom three lines, Your Honor, or the bottom five
5 even, that start with "All."

6 Same thing, Your Honor, on the next page, another chat
7 memorializing this decision.

8 (Pause in proceedings.)

9 **MR. WEINGARTEN:** Same thing on the next page, an
10 e-mail memorializing this decision.

11 We're going to bring you a lot of evidence, Your Honor,
12 about what happened with ZeniMax because we think it's
13 instructive about the incentives that Microsoft faces once it
14 owns a AAA publisher.

15 Now, Microsoft is going to talk about the model. Before
16 they bought ZeniMax -- sorry. Before they bought Activision,
17 they built the deal model; right? They had their bankers
18 analyze: What is Activision worth to us? What should we pay?

19 I'm not going to get into the numbers but suffice to say,
20 Your Honor, there is a substantial cushion between what
21 Activision is worth to Microsoft and what they paid. So when
22 Microsoft says, "Oh, the deal model, we can't possibly hurt
23 Activision's revenues by taking content away, the deal model
24 won't allow for it. It would be a bad deal," the board was
25 told "There's quite a cushion there for a lot of revenues to

OPENING STATEMENT / WEINGARTEN

1 disappear if the strategic decision makes sense."

2 I should also say, Your Honor, you're going to hear
3 testimony these deal models are not binding, they're not
4 binding on the executives. And there was a deal model just
5 like the one for Activision that was for ZeniMax, and we saw
6 already some evidence about what the decision was with respect
7 to ZeniMax.

8 Now, you're going to hear a ton, Your Honor, I believe,
9 from Defendants about their commitments to foreign regulators
10 and their agreements with various rivals in the market. Now,
11 first, those are legally irrelevant. We've got the citations
12 in our brief. This case is not about deciding the right
13 remedy, if there is one, for this transaction.

14 And, second, even if they were not completely irrelevant,
15 the law is that any proposed remedy needs to dispel any and all
16 doubts about the transaction's legality. And Your Honor's
17 going to see the terms of the agreements, if we get to it, fall
18 far short of dispelling any and all doubts.

19 And, finally, Your Honor, you're going to hear a lot about
20 Mobile, and that that was the rationale. And the evidence is
21 going to show you that the deal model, which they like to tout
22 when it suits them, puts the Mobile synergies and value at a
23 very small percentage of the overall deal.

24 And Your Honor is going to hear other evidence; and even
25 if, Your Honor, even if this deal has great impacts on Mobile,

OPENING STATEMENT / WEINGARTEN

1 that one day Microsoft is able to break the duopoly, as they
2 call it, of Apple and Google and get a store, first of all,
3 that's quite speculative, but even if it did do that and they
4 could promise it, that's legally irrelevant. You can't offset
5 the harm that we're going to demonstrate in all of these other
6 markets with a possible benefit in a different market.

7 That's it, Your Honor. The equities also support us.
8 We're going to be showing you, Your Honor, that the public
9 interest in letting the FTC decide the merits of this
10 transaction outweighs the parties' interest in rushing to
11 complete a deal. And the facts and the law and the evidence we
12 have accumulated, we're going to bring it to Your Honor -- I
13 showed you the highlights -- and we're very certain that at the
14 conclusion of this presentation, you're going to grant the
15 preliminary injunction.

16 Thank you.

17 **THE COURT:** Thank you.

18 Ms. Wilkinson.

19 **MS. WILKINSON:** Thank you, Your Honor.

20 I have a slide deck. It's a bit shorter. Like
21 Mr. Weingarten, I have one slide in here that's confidential.
22 It's marked "Confidential." It will not come up on the screen,
23 but it's in your copy and the FTC's copy.

24 **THE COURT:** Thank you.

25 (Pause in proceedings.)

OPENING STATEMENT / WILKINSON**OPENING STATEMENT**

MS. WILKINSON: Your Honor, on January 18th of last year, 2022, the merger of acquisition -- excuse me -- of Activision and Xbox through Microsoft was announced; and on that day, it was all good news for consumers because you are going to be able to see that there was some of the most popular games produced, developed, and published by Activision and a company that had a great strategy for trying to break the status quo.

And what do I mean by that? For almost 20 years, Sony has been the leader in the console market no matter how you define it, and they have protected that market and been the dominant player because they have a high profit margin when they sell that game, whichever game it is, whether it's Call of Duty or one of their exclusives, for \$70 to a consumer who wants to play their game.

And you know they want to protect that market because they refuse to allow any of their games, especially those that are day and date, which is how they describe, you know, launching them on the first day, they allow none of those to be in any subscription service. They don't allow any of those to be streamed on the cloud, and they try to keep as many of their games exclusive as they can.

And the reason they do that is because they understand if it goes into a subscription service, which is what Xbox wants

OPENING STATEMENT / WILKINSON

1 to do and has already done with many of its games and wants to
2 do with Call of Duty and other Activision games, that the
3 consumer will now have a choice. They can buy the game and an
4 expensive console or they can subscribe to Game Pass and they
5 don't have to pay for Call of Duty. They can play it through
6 the subscription. So it's much more accessible to many more
7 consumers and it's cheaper.

8 But with that comes a threat to Sony because people are
9 going to choose often to play it in the subscription -- through
10 their subscription than they are to buy it, and I think you'll
11 hear from Mr. Phil Spencer, who's the CEO and he's here with us
12 today and he'll be here the entire time, something he says,
13 which is "One person or one company's margin is another
14 person's opportunity."

15 So Sony has a big margin and Xbox is looking for an
16 opportunity. They're looking for an opportunity to move people
17 away from consoles and be able to provide more games on more
18 devices to more people, and that model will allow people after
19 this transaction to be able to play Call of Duty in many more
20 places.

21 So when Counsel says that Xbox can withhold this game,
22 they literally cannot do it. They cannot do it because they
23 have signed agreements, as you will hear, with Nintendo, who
24 has not had access to Call of Duty in years. They are now
25 going to provide Call of Duty to Nintendo. They have also

OPENING STATEMENT / WILKINSON

1 signed agreements with Nvidia, one of the cloud gaming
2 services, Boosteroid, YuvaSoft, and others that you'll hear
3 about so that Call of Duty and other Activision games can be
4 streamed.

5 So if you look at the simple, simple question of what is
6 happening before and what is happening after, before COD can be
7 played on only two companies' devices and it's not on Switch.

8 Right now you cannot stream COD anywhere and you cannot
9 find it under any subscription service. After the transaction,
10 you will be able to do all of those things. So by definition,
11 it's good news for the consumer.

12 And everyone believes that, when this transaction was
13 announced, even Sony who has now become the complainer-in-chief
14 in this case and you heard almost nothing about, but they are
15 the ones that are worried about what's going to happen to them.

16 So let's take a look at what the overall global gaming
17 market looks like so you can understand as the witnesses
18 explain to you why they want their strategy and how they think
19 they can effectuate it with the games from ABK and why it would
20 make absolutely no sense to withhold these games from a
21 financial perspective, from a gamer's perspective, from a
22 reputational perspective.

23 So if we could look at Slide Number 1, you will see this
24 is the most recent data we have on the global gaming market and
25 it's huge. There's \$210 billion revenues -- of revenues. And

OPENING STATEMENT / WILKINSON

1 look at the comparison. Console is the smallest part of the
2 market. It's 283 million. PC's are 337 million and mobile is
3 148 billion.

4 And you'll hear from Sarah Bond today about that move, the
5 evolution of the market. It makes sense, I think to all of us,
6 as we've seen everyone use phones for almost everything.
7 94 percent of gamers game on a mobile phone.

8 So there is no --

9 **THE COURT:** Wait a minute. When you're talking about
10 gamers, you're -- all video games?

11 **MS. WILKINSON:** Yes.

12 **THE COURT:** Solitaire?

13 **MS. WILKINSON:** Exactly, Your Honor.

14 **THE COURT:** Candy Crush?

15 **MS. WILKINSON:** Candy Crush, all kinds of gamers, yes.

16 Again, in this case we're focused on Call of Duty because
17 the FTC is alleging that's going to be what's withheld, but I
18 think you'll hear from our clients that there are so many
19 different kinds of games and they want to provide and do
20 provide many different choices to consumers.

21 But if you look at that console market, that's not going
22 to get bigger by percentage because there's many more potential
23 gamers out in the world. There's supposedly 3 billion gamers
24 and it could be up to 4 by 2030. And those people are moving
25 to mobile. They don't want to pay for a console. They don't

OPENING STATEMENT / WILKINSON

1 want to buy a game. Many of those people can't afford it. And
2 the one device they have is their mobile phone. So everyone
3 recognizes in the market that people are moving to mobile.

4 And that's what the folks at Xbox wanted to do, and that
5 is why simply they wanted to buy Activision. They had been
6 looking to move into the mobile market. They had not been
7 successful. You'll hear that they looked at other companies to
8 buy. And when Activision became available, they had the first
9 opportunity to become a presence in the mobile market to get
10 the folks at King, which is the part of Activision that
11 produces Candy Crush and other mobile games, so that they could
12 learn from those folks how to develop native games, which is
13 what it's called when it's played on the phone itself and not
14 from cloud; and, more importantly, how to market those games,
15 how to retain customers.

16 The folks at Candy Crush, I think you know, are incredibly
17 successful at that and that's something that Xbox has not been
18 able to do, and that is just one of the key ways they think
19 they can execute on their strategy.

20 No matter how you look at it in this case, no matter what
21 Counsel says, Xbox is third in a three-console market.

22 If you look at the global shares for 2021, you can see,
23 you can measure it by revenues, you can measure it by the units
24 sold, the actual consoles, or the installed base, which means,
25 you know, the consoles that are already out there plus the new

OPENING STATEMENT / WILKINSON

1 consoles that are being sold. And no matter how you look at
2 it, Xbox comes in third.

3 And if you take the FTC's definition of the market and you
4 take out Nintendo Switch, it only gets worse for Xbox.

5 So Mr. Spencer knows that to be successful in the future,
6 he has to be able to move not only into the mobile section but
7 also to spread his games out to as many people as possible.
8 And the most lucrative way to do that and the most important
9 way to do that is to take games that are what's called
10 multiplayer, which means people play against each other and
11 they play on different platforms.

12 And that's what COD does. So if you want to play COD, you
13 can play against your friends if you're all on Xbox; but if you
14 want to play against your friends who have a PlayStation, you
15 can also do that.

16 So why is that great? Obviously it's just more potential
17 people -- right? -- who can play, and so the revenues from
18 that, the potential revenues, are much larger and that's part
19 of the reason COD is so successful. It's a great game. People
20 love to play it, but it also has become successful because
21 it -- the folks at Activision have figured out that if you put
22 that on multiple platforms and you allow people to play across
23 platform and then they sometimes spend in game, which is called
24 in-game monetization, they have developed a very, very
25 lucrative franchise.

OPENING STATEMENT / WILKINSON

1 And they have also developed Call of Duty Mobile, so a
2 separate game that is native to mobile that also generates a
3 significant amount of revenues.

4 And what the government is suggesting to you is that
5 somehow Xbox, which is in need of those revenues, in need of
6 that business to try and grow into the other parts of the
7 market would somehow forego those as the smallest player in the
8 market. So when you look at that console share, you can just
9 see, common sense is there's almost two times the number of
10 players of COD on PlayStation as there are on Xbox.

11 So why in the world would Xbox when it then finally owns
12 the content give up those revenues? It's two times the
13 revenues, and the revenues that come -- I'm going to move ahead
14 so I can just show you the mobile presence. Excuse me.

15 (Pause in proceedings.)

16 **MS. WILKINSON:** Sorry, Your Honor.

17 I want to go backward please. Sorry. There we go.

18 So today with 3 percent -- or .3 percent in mobile, it's
19 not as if tomorrow they are going to have a significant
20 presence in mobile just because of Activision. So they need to
21 still have the revenues from the console sales and the majority
22 of those console shares come from PlayStation.

23 So economically it makes no sense to withhold. It doesn't
24 make sense to upset all those consumers, those gamers who like
25 to play against each other. And if you cut off PlayStation

OPENING STATEMENT / WILKINSON

1 players, Xbox players would lose two-thirds of the folks that
2 they play against.

3 It matters for them because one of the great things that
4 happens when you play across platform and you have multiplayer
5 is you have more people to match up against. You'll hear about
6 that. So you'll have more people who can play at your skill
7 level.

8 So maybe if you're people like us who don't play very
9 often or ever, you can play against each other and not feel so
10 badly; and the folks that are really great, can match up and
11 play against each other.

12 That's one of the features that the gamers love about
13 this. And if you cut off a source, a huge source of gamers,
14 the game itself is not as appealing to people so you lose
15 revenue, and that just gets worse and worse because then more
16 gamers are upset.

17 Let alone, as you'll probably have seen from the media
18 coverage, gamers have very strong opinions about what goes on
19 and they make very clear to Xbox that they want to play Call of
20 Duty on all these different consoles.

21 So there's reputational issues, there's monetary issues,
22 revenue issues, and then there is the deal model that you heard
23 about.

24 And generating a model to go to the board of directors to
25 say "Here's how we justify the deal" and a huge portion of it

OPENING STATEMENT / WILKINSON

1 is based on existing revenues coming out of Activision, it's
2 not as if they can just disregard that. I think that's a --
3 that's a -- that's a very naive suggestion.

4 And just so you don't have any doubt, we're going to bring
5 in Ms. Amy Hood, who's the CFO; and I think when you meet her,
6 you won't have any doubt that she holds Mr. Spencer and the
7 folks at Xbox to their margin targets and to their P&L, and
8 they have to decide that -- how they're going to meet those
9 numbers. And they have told her and she and Mr. Nadella have
10 told the board that they are going to use those revenues to
11 support this business over the next 10-plus years.

12 So there's absolutely no suggestion in the evidence that
13 they would change and decide to pull Call of Duty because they
14 couldn't -- they couldn't afford it. They couldn't look the
15 board in the eyes and say they did it, and they couldn't face
16 the wrath from the gamers.

17 But in this case, unlike almost any case you might decide,
18 you don't have to worry about would they do it because they've
19 made these contracts to assure you that they will do it. And
20 that's why this is one of the most unusual vertical merger
21 cases.

22 As you know, there's very few that ever get tried.
23 They've never won and there's certainly never been one like
24 this where they're actually protecting the dominant player,
25 Sony, and trying to maintain the status quo when one of the

OPENING STATEMENT / WILKINSON

1 smaller players is trying to become more competitive.

2 And they have one economist who's going to try to explain
3 this to you and say that that's what's going to happen. And
4 it's Dr. Lee says that the market is only the two participants
5 that we've been discussing, Xbox and PlayStation, and he says
6 it's only a U.S. market. We don't agree with any of that and
7 we'll talk about that during the trial.

8 But let's for a moment assume that everything he's saying
9 is true; that in the U.S. PlayStation right now has 56 percent
10 of the market and Xbox has 44.

11 So you can see PlayStation is the dominant console player
12 in his market. And he also will come and tell you that he
13 calculates that if Xbox were to withhold all of Call of Duty,
14 that would cause a 5 percent market share.

15 I don't have a Ph.D. in economics but if you do the math,
16 that's what the market looks like. Sony will have 50.5 percent
17 and Xbox will have 49.5 percent. And that's why you can't find
18 a case like this, because there's not a case that the
19 Government has ever brought where the market is getting less
20 concentrated and more competitive.

21 So even if everything bad that the Government says will
22 happen, it only makes the market more competitive. So there's
23 absolutely no basis to enjoin the transaction when everything
24 that the company can do, will do, and the market will do will
25 show that it will only become more competitive and better for

OPENING STATEMENT / WILKINSON

1 gamers.

2 Now, everyone knows this, including Mr. Ryan, who is the
3 complainant that you'll hear from tomorrow by video deposition
4 because he's not coming here, even though he came a few weeks
5 ago when I deposed him, he did come to Washington, but he isn't
6 coming here so we're going to play parts of that deposition for
7 you.

8 And when we received the documents from him, we found that
9 right after the transaction, he admitted in a candid e-mail
10 with the former CEO of Sony that he didn't believe this was an
11 exclusivity claim, which is, you know, will Xbox keep it to
12 themselves.

13 And so let's take a look at -- that's the e-mail, and you
14 can see this is Mr. Ryan who is responding to Mr. Deering,
15 who's the former CEO of Sony, and they are discussing the topic
16 we're discussing today: The Microsoft acquisition of
17 Activision.

18 Mr. Ryan is saying, not realizing that other people are
19 going to read this e-mail, and he says (as read):

20 "It is not an exclusivity play at all. They're
21 thinking bigger than that and they have the cash to make
22 moves like this. I've spent a fair bit of time with both
23 Phil and Bobby" -- Bobby is Mr. Kotick, the CEO of
24 Activision. "I've spent a fair amount of time with them
25 over the past day, and I'm pretty sure we will continue to

OPENING STATEMENT / WILKINSON

1 see COD on PlayStation for many years to come."

2 Why did he believe that? Because Mr. Spencer had called
3 him, Mr. Nadella had reached out to the CEO of Sony and assured
4 him that that would happen, but he also understands the
5 economics; that for COD to be successful, it needed to be on
6 his platform.

7 And what does he say in terms of the threat to his
8 business or competition? He says "We have some good stuff
9 cooking," which turned out to be he was buying another studio
10 called Bungie and announced it very -- a few days after that
11 (as read):

12 "I'm not complacent and I'd rather this hadn't
13 happened, but we'll be okay. We'll be more than okay."

14 So when he heard about the transaction when he was talking
15 to his mentor, when he was talking to his investors you'll see
16 and his board, he admitted that while this wasn't great news,
17 they would be fine, they would be just fine.

18 But several months later, he realized that that would
19 actually make Xbox more competitive. So what did he do? He
20 and the folks at Sony started traveling around the world to
21 complain to regulators.

22 And to try to assure Sony that they had nothing to worry
23 about, Mr. Spencer had told them from day one that he would
24 provide and guarantee that COD would be on PlayStation after
25 the merger. And not just after because there's already

OPENING STATEMENT / WILKINSON

1 contractual obligation for it to be on through 2024, so there's
2 not even a possibility of this withholding until 2025, but he
3 assured him it would be on after that; and as you saw, he
4 believed it.

5 Months later the folks at Xbox actually sent an offer to
6 Mr. Ryan to give him exactly what he wanted, and they've been
7 doing that back and forth. And I'm going to show you just the
8 most simple terms that tell you what Xbox is trying to give
9 Sony.

10 They are willing to give them ten years of content on
11 PlayStation, which is an unheard of length of time. There
12 are -- we haven't found gaming contracts that are ten years or
13 even five years. They are going to give them release date
14 parity. What does that mean? So PlayStation gets to release
15 it on the same day.

16 **THE COURT:** Can you hold on one second?

17 **MS. BENNETT:** I'm very sorry to interrupt. My
18 understanding was that this document has been marked
19 confidential. I can't read the exhibit number from the back,
20 but I believe that this document is confidential.

21 **THE CLERK:** And you are?

22 **MS. BENNETT:** My name's Elsbeth Bennett for Sony
23 Interactive Entertainment.

24 **MS. WILKINSON:** Are you talking about the slide with
25 parity on it?

OPENING STATEMENT / WILKINSON

1 **MS. BENNETT:** If I can have a moment, Your Honor.

2 **THE COURT:** Okay.

3 **MS. WILKINSON:** Your Honor, what we can do is just
4 take that down and I can just continue to talk.

5 **THE COURT:** I believe it is down.

6 All right. Let's not talk about the contents anymore.

7 **MS. WILKINSON:** Okay. So the offer allows them to get
8 exactly the same thing that Xbox will get in every way. So
9 when you heard about, well, even if they don't withhold it,
10 they might do what's called partial foreclosure, like somehow
11 make a degraded game that they would give to Sony versus what
12 Xbox would have, they're guaranteeing them they won't.

13 But, again, it doesn't make sense. Think of the movie
14 business. If you make a movie, spend all that money to develop
15 a movie and let's say you own the movie theaters in Omaha and
16 Sony owns the movie theaters in New York, why would you in the
17 smaller market sell your best game and sell a degraded movie in
18 New York in your big market? It doesn't make any sense.

19 Everybody wants to play the best game, and it only
20 reflects poorly on the developer if the game is somehow
21 degraded or, you know, less -- has fewer features or works more
22 slowly, or whatever it is that they claim is partial
23 foreclosure.

24 And we don't know what that is, Your Honor. You're going
25 to see -- Dr. Lee is going to come in. He did no economic

OPENING STATEMENT / WILKINSON

1 analysis to say what this partial foreclosure is. The FTC has
2 kind of pivoted on their theory in their last brief, but we
3 have no idea what they are claiming would actually happen if
4 there was partial foreclosure.

5 But despite this offer being held to Sony and them saying
6 at the same time they absolutely need COD, they don't know how
7 to say yes to what they say they really need so they refuse to
8 negotiate and figure out how to get this content and work with
9 us to come to an agreement.

10 At the end of the case after you hear from all of the
11 witnesses, learn a little bit about gaming, you will learn a
12 lot about the economics of it, and I think you will see that
13 every piece of evidence shows that it only makes sense for Xbox
14 to make these Activision games available to as many people on
15 as many platforms as possible, and it's consistent with what
16 they want to do as a company.

17 And if there's any doubt, any doubt, we hope, Your Honor,
18 that you will ask questions of our witnesses. We are only here
19 to present the evidence that you need because you are the
20 decision maker.

21 And as we said in our pleadings, and I want to make clear
22 just one last time, this is going to decide whether the deal
23 goes forward because if we can't close by July 18th and the
24 Court enjoins the transaction to go through the three-year
25 administrative nightmare, nobody could withstand that and we

OPENING STATEMENT / WILKINSON

1 certainly can't because it's not just going to administrative
2 hearing on April 2nd; it is -- then it takes Judge Chappell, a
3 long time, as is his right, to make detailed findings. And
4 then all he can do now because the FTC just changed the rules,
5 he doesn't even get to make a decision like you did as a
6 magistrate. He just gets to make a recommendation and they
7 just get to start *de novo* the commission and review it. They
8 can ignore his findings, his credibility findings.

9 And we all know what the result will be because they've
10 never voted against themselves. They're the prosecutor, the
11 jury, and the appeals court. So they will rule in their favor,
12 and then we will have to go to a circuit court, come back to an
13 Article III judge or judges to try to appeal to say they made
14 the wrong decision. That normally takes about three years.

15 If that were what's allowed in these merger cases, I don't
16 think it's just these two companies who couldn't survive,
17 almost no one could survive that, and that's why we come to
18 Federal Court asking you to apply the Federal Rules as you
19 mentioned yesterday and decide that there is no basis to enjoin
20 this transaction.

21 Thank you.

22 **THE COURT:** Thank you.

23 All right. Is the FTC prepared to call your first
24 witness?

25 **MR. WEINGARTEN:** Yes, Your Honor, we are. Our first

OPENING STATEMENT / WILKINSON

1 witness will be Mr. Matt Booty, and my colleague Nicole Callan
2 will be conducting the examination. Thank you.

3 (Pause in proceedings.)

4 **THE COURT:** I assume someone went to get Mr. Booty.

5 **MS. WILKINSON:** Excuse me, Your Honor, while we're
6 waiting. We just checked and the Sony offer is not
7 confidential. I'm sure counsel for --

8 **THE COURT:** Yeah. Why don't you just speak with
9 Counsel while we're waiting.

10 (Pause in proceedings.)

11 **THE COURT:** We know Mr. Booty is here?

12 **MR. WEINGARTEN:** We issued a trial subpoena. I'm told
13 he's here in the building.

14 **MR. KILARU:** I guarantee he's here, Your Honor. He's
15 in the elevator. He'll be down.

16 **THE COURT:** Okay.

17 (Pause in proceedings.)

18 **MATT BOOTY,**

19 called as a witness for the Plaintiff, having been duly sworn,
20 testified as follows:

21 **THE CLERK:** Please state your name for the record.

22 **THE WITNESS:** Matt Booty.

23 **THE CLERK:** Thank you.

24 **THE COURT:** You may be seated.

25 **THE WITNESS:** Thank you, Your Honor.

BOOTY - DIRECT / CALLAN

1 **MS. CALLAN:** Your Honor, permission to give the
2 witness a binder.

3 **THE COURT:** Yes.

4 **MS. CALLAN:** And you have a binder as well?

5 **THE COURT:** Yes.

6 **MS. CALLAN:** I'm Nicole Callan for Plaintiff.

7 **THE COURT:** You may go ahead.

8 **DIRECT EXAMINATION**

9 **BY MS. CALLAN:**

10 **Q.** Good morning, Mr. Booty.

11 Could you please state your name for the record?

12 **A.** Matt Booty.

13 **Q.** And your current job is the head of Xbox Game Studios at
14 Microsoft; correct?

15 **A.** That's correct.

16 **Q.** And you have been the head of Xbox Game Studios since
17 2018; is that right?

18 **A.** That's correct.

19 **Q.** And you report directly to Microsoft Gaming CEO Phil
20 Spencer; correct?

21 **A.** Yes.

22 **Q.** And you're a member of Microsoft gaming leadership team?

23 **A.** Correct.

24 **Q.** The gaming leadership team is made up of Phil Spencer's
25 direct reports; right?

1 A. Yes.

2 Q. And Xbox Game Studios develops and publishes video games;
3 correct?

4 A. Yes.

5 Q. And as head of Xbox Game Studios, you are responsible for
6 overseeing the teams making games for Microsoft internal
7 studios; correct?

8 A. That's correct.

9 Q. And you are responsible for Xbox Games Studios strategy;
10 correct?

11 A. Yes.

12 Q. Sir, I'd like to go over some industry terms for the
13 benefit of the Court.

14 "Game developer" is a team or studio that creates a video
15 game; correct?

16 A. Yes, that's right.

17 Q. Meaning that the game developer is writing the software
18 and creating the art; correct?

19 A. Yes.

20 Q. And the game publisher provides the funding and helps take
21 a game to market; right?

22 A. Yes, that's accurate.

23 Q. And some games are called first-party games?

24 A. Yes.

25 Q. And for Microsoft "first-party games" means games

BOOTY - DIRECT / CALLAN

1 developed by studios that Microsoft owns; correct?

2 A. Yes.

3 Q. And so an example of a Microsoft first-party game would be
4 Halo; correct?

5 A. Yes.

6 Q. And games on Xbox that come from publishers other than
7 Microsoft-owned studios are called third-party games; right?

8 A. Yes.

9 Q. So Microsoft Call of Duty is an example of a third-party
10 game; correct?

11 A. That's right.

12 Q. And you use the term "content" to refer to games; correct?

13 A. Sometimes, yes.

14 Q. And additional purchases and updates associated with games
15 are also content?

16 A. Yes.

17 Q. And the term "catalog content" means older, previously
18 released games; right?

19 A. Often, yes.

20 Q. And the term "AAA" is used in the gaming industry?

21 A. In many different contexts, yes.

22 Q. AAA can sometimes refer to the quality level of the game?

23 A. Among other things, yes.

24 Q. And it can sometimes refer to the budget size of the game?

25 A. That's accurate.

BOOTY - DIRECT / CALLAN

1 Q. And it can sometimes refer to consumer expectations about
2 the game; correct?

3 A. Yes.

4 Q. And when someone uses the term "AAA" to describe the
5 quality of a game, they're referring to a high-quality game;
6 right?

7 A. Within the context of the developer, the team, or the
8 specific franchise, yes.

9 Q. And the term "tentpole" is also used in the gaming
10 industry?

11 A. Sometimes, yes.

12 Q. And tentpole games are games that are well-known or
13 recognizable brands; right?

14 A. Yes, or play a role in a specific marketing campaign or
15 portfolio line-up.

16 Q. And consumer expectations can be higher for games with
17 name recognition; correct?

18 A. Often, yes.

19 Q. Consumers may expect more complicated technology?

20 A. Sometimes.

21 Q. And they may expect longer game play?

22 A. Sometimes. Not always.

23 Q. And they may expect more sophisticated story lines?

24 A. That varies greatly depending on the genre or the type of
25 games. Some games have more story lines than others.

BOOTY - DIRECT / CALLAN

1 Q. And meeting consumer expectations for a game like Halo can
2 cost more?

3 A. Sometimes, yes.

4 Q. You need more software developers?

5 A. Yes.

6 Q. You may need more artists?

7 A. Yes.

8 Q. And you may need more time?

9 A. Sometimes.

10 Q. And developing games has become more expensive in the last
11 five to ten years; correct?

12 A. As a general trend, yes.

13 Q. And games are taking longer on average to develop;
14 correct?

15 A. On average.

16 Q. And many games are being delayed and take longer than
17 initially planned; correct?

18 A. That happens, yes.

19 Q. And would you agree that developing games is more of an
20 art than a science?

21 A. I would say it is a mixture of both at times.

22 Q. I'd like to talk to you now about the term "exclusivity"
23 and how it's used at Microsoft.

24 Halo Infinite is an example of a Microsoft first-party
25 game that is available on Xbox consoles; correct?

BOOTY - DIRECT / CALLAN

1 **A.** That's right.

2 **Q.** And Halo Infinite is also available on PCs; correct?

3 **A.** That's correct.

4 **Q.** And Halo Infinite is available on Xbox Game Pass?

5 **A.** Yes.

6 **Q.** But Halo Infinite is not available on PlayStation
7 consoles; correct?

8 **A.** That's correct.

9 **Q.** And Halo Infinite is an example of a game that you would
10 call an exclusive to Xbox; correct?

11 **A.** To Xbox consoles as well as PC Windows, yes.

12 **Q.** So you sometimes use the term "exclusive" to mean that a
13 game would be available on Xbox consoles, Xbox Game Pass, and
14 PC; correct?

15 **A.** That's correct.

16 **Q.** You also sometimes use the term "timed exclusive"?

17 **A.** Sometimes, yes.

18 **Q.** And a timed exclusive can mean Microsoft launches the game
19 on Xbox first and then some period of time later you would
20 bring the game to PlayStation; correct?

21 **A.** Or other platforms.

22 **Q.** And in your role as the head of Xbox Game Studios, you
23 make recommendations on whether games should be exclusive;
24 correct?

25 **A.** I have input into those recommendations. I don't have the

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1 final decision-making authority on that.

2 Q. And Microsoft does not have any policy for making
3 exclusivity decisions; correct?

4 A. No.

5 Q. And there's no set form or procedure for determining the
6 platforms that a game is on; is that right?

7 A. No. I would say that it is discussed and there are a lot
8 of principles and factors that go into it. It's discussed but,
9 yeah, it's often discussed.

10 Q. So your understanding is that Microsoft is making these
11 decisions on a case-by-case basis; correct?

12 A. Depending on the game and the context, yes.

13 Q. And you are considering a number of factors; correct?

14 A. That's right.

15 Q. And platform decisions are subject to change in the time
16 period leading up to the release of the game; correct?

17 A. I'm sorry. Could you repeat the last part?

18 Q. Platform decisions are subject to change in the time
19 period leading up to the release of the game?

20 A. That decision needs to be made fairly early on in the
21 development of a game. Once a team starts on a technology base
22 or making decisions about which hardware to support, it is rare
23 and in my experience very difficult to make that sort of change
24 late in production.

25 Q. But in your experience, exclusivity decisions are

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1 revisited; correct?

2 **A.** They can be but, again, there's a time window during which
3 that's feasible and then a point of time at which it's not.

4 **Q.** And the decision about exclusivity can remain open or
5 unclear up until the final point where a decision needs to be
6 made; correct?

7 **A.** Well, I guess the decision would be unclear until the
8 decision is made, that's correct.

9 (Laughter)

10 **BY MS. CALLAN:**

11 **Q.** And a number of people at Microsoft are involved in making
12 exclusivity decisions; is that correct?

13 **A.** That's correct.

14 **Q.** But Microsoft gaming CEO Phil Spencer has the final say on
15 exclusivity?

16 **A.** Yes.

17 **Q.** In 2014 Microsoft acquired a game developer called Mojang;
18 is that right?

19 **A.** That's right.

20 **Q.** And Mojang developed the game Minecraft?

21 **A.** Correct.

22 **Q.** And then between 2018 and 2020, Xbox Game Studios acquired
23 eight additional game studios; right?

24 **A.** That's correct.

25 **Q.** And you believed it was noteworthy that Microsoft was

BOOTY - DIRECT / CALLAN

1 acquiring studios and that you were acquiring studios at that
2 rate; correct?

3 A. Noteworthy. We acquired those studios, yeah.

4 Q. And you would agree that that was noteworthy that you were
5 acquiring those studios at that rate?

6 A. Within the industry, yes.

7 Q. And then in 2021 Microsoft acquired a game developer
8 called ZeniMax?

9 A. That's correct.

10 Q. And ZeniMax is also sometimes referred to as Bethesda;
11 correct?

12 A. Bethesda is a part of ZeniMax.

13 Q. So that's because Bethesda is the name of ZeniMax's
14 largest studio; correct?

15 A. That's correct.

16 Q. Microsoft paid roughly \$7 billion for ZeniMax?

17 A. That's right.

18 Q. The term "generation" is used to describe certain video
19 game console hardware; correct?

20 A. Yes.

21 Q. And the current generation of consoles is Generation 9?

22 A. That's right.

23 Q. And the Xbox series S and X are Generation 9 consoles;
24 right?

25 A. Yes.

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1 Q. PlayStation 5 is a Generation 9 console?

2 A. That's correct.

3 Q. The previous generation is Generation 8?

4 A. That's right.

5 Q. And Xbox one is Generation 8?

6 A. That's right.

7 Q. And PlayStation 4 is Generation 8?

8 A. That's how we would refer to it, yes.

9 Q. In general it is more difficult to develop games for each
10 new console generation; correct?

11 A. There is definitely a learning curve as the developers
12 learn the specifics of a new piece of hardware and there is a
13 ramp-up time, yes.

14 Q. And is it also more difficult to develop games for each
15 new console generation because the sophistication and
16 complexity of the hardware increases with each generation?

17 A. As a general trend, I would say the difficulty happens
18 during that initial learning period as the developers become
19 familiar with the new hardware.

20 Q. And the current Nintendo console is the Nintendo Switch;
21 is that right?

22 A. That's right.

23 Q. And you do not consider Nintendo consoles in the same
24 generation taxonomy as Microsoft and Sony consoles; correct?

25 A. In general, although we consider from a platform release

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1 standpoint the Switch to be one of that same line-up. A recent
2 game that we launched, a launch day and date on PlayStation
3 Xbox and Switch across all of those platforms simultaneously,
4 so we consider them contemporaneous.

5 Q. You don't, for example, consider the Nintendo Switch to be
6 a Generation 9 console; correct?

7 A. In general it's not referred to as that.

8 Q. And Nintendo's console hardware is generally a generation
9 or two behind Xbox and PlayStation; correct?

10 A. I don't -- I wouldn't necessarily agree with that
11 characterization in terms of full generation behind.

12 Q. Do you see a binder in front of you?

13 A. I do.

14 Q. Could you turn to PX7048? And PX7048 is a copy of
15 testimony you gave in this matter; correct?

16 A. Give me time to get familiar with the document. Thank
17 you.

18 (Witness examines document.) Okay. I see it, yes.

19 Q. And you were under oath when you gave this testimony?

20 A. That's correct.

21 Q. Please turn to page 136 of the transcript pages so you'll
22 see the transcript pages in the upper right-hand corner of each
23 page.

24 Do you see where you were asked at line 11 (as read):

25 **"QUESTION:** Would that also refer to the Nintendo Switch?"

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1 And your answer was (as read):

2 **"ANSWER:** You know, I don't know. I don't know that most
3 people would say that it does. Nintendo tends to ship
4 their consoles sort of on their own cycle, which is a bit
5 different from Xbox and PlayStation. And because their
6 consoles are generally a generation or two behind us in
7 terms of the power of the hardware, hardware complexity,
8 graphical complexity, we don't really think about them in
9 the same evolutions" --

10 And this says "of generalizations." I believe you said
11 "generations."

12 **A.** That's correct.

13 **Q.** That testimony was truthful and accurate when you gave it?

14 **A.** It was.

15 **Q.** So the Nintendo Switch is a less technically capable piece
16 of hardware than the current PlayStation and Xbox consoles;
17 correct?

18 **A.** Yes.

19 **Q.** In fact, the Nintendo Switch is a radically less powered
20 piece of hardware; correct?

21 **A.** I would not agree with the characterization "radically."

22 **Q.** Could you turn to page 131 of your deposition, PX7048?

23 **A.** (Witness examines document.) Okay. I see it.

24 **Q.** And do you see at line 14 you were asked (as read):

25 **"QUESTION:** What would be downgraded to beyond Switch?"

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1 And you answered (as read):

2 **"ANSWER:** Well, we would just have to adjust the assets
3 and the graphical complexity to run on the lower -- the
4 lower-powered hardware so that could mean running -- these
5 are just examples. It's not exhaustive or specific. It
6 might mean running at a lower resolution. It might mean
7 creating lower resolution assets in the game. It might
8 mean running at a lower frame rate. It might mean less
9 complexities in the scenes that are presented in the game.
10 It is more of an art than a science on how you would take
11 something to a radically less powerful -- powered piece of
12 hardware."

13 Do you see that?

14 **A.** I do.

15 **Q.** And that testimony was truthful and accurate when you gave
16 it?

17 **A.** It was.

18 **Q.** Do you agree that the Nintendo Switch is a radically less
19 powered piece of hardware?

20 **A.** It is less powered, less powerful.

21 **Q.** And that difference in performance impacts what games can
22 actually run on the Switch; correct?

23 **A.** That's correct.

24 **Q.** And the Nintendo Switch also has a different customer base
25 than Microsoft's Xbox; correct?

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1 A. I'm not entirely familiar with exactly how they would
2 characterize their customer base. We consider there to be an
3 awful lot of overlap between their customer base and ours at
4 times, but I don't have those details.

5 Q. Do you consider there to be a difference in the customer
6 base between the Nintendo Switch and Microsoft's Xbox?

7 A. I imagine there are some differences and there is some
8 overlap.

9 Q. And Nintendo customers tend to skew younger; correct?

10 A. That is perception but, again, I don't have actual data on
11 that or, you know, know their market demographics.

12 Q. And Nintendo is known for more family rated games; right?

13 A. I think in general their portfolio has more of those, yes.

14 Q. It is not a foregone conclusion that a game that has done
15 well on Xbox would do well on Switch; correct?

16 A. That's fair to say, yes.

17 Q. Let's take the example of Halo again. A game like Halo
18 would be almost impossible in its current form to get running
19 on the Switch; correct?

20 A. It would require material work to get it running on the
21 Switch, yes.

22 Q. And do you agree that it would be almost impossible to get
23 it running on the Switch in its current form?

24 A. Yeah. The key there being "in its current form."

25 Q. You would have to create a whole new version of the game

BOOTY - DIRECT / CALLAN

1 to put Halo on Switch; correct?

2 **A.** It would be -- it would need significant work and
3 modifications to get it to run, yes.

4 **Q.** That would be a pretty large project?

5 **A.** I think so, yes.

6 **Q.** And if you did create a version of Halo for the Switch, it
7 would be a fairly downgraded version of the game; correct?

8 **A.** Compared to the Xbox series S and X, for example, yes.

9 **Q.** To bring Halo to the Switch you would have to lower the
10 graphical complexity of the game; right?

11 **A.** Among other things, yes.

12 **Q.** And that might mean running at a lower frame rate?

13 **A.** Possibly. That would be one of the tradeoffs that could
14 be made.

15 **Q.** And it might mean running at a lower resolution?

16 **A.** Again, possibly there would be a number of tradeoffs
17 between complexity, frame rate, resolution that we would have
18 to make tradeoffs there, yeah.

19 **Q.** And it might mean less complex scenes in the game; right?

20 **A.** Possibly, yes.

21 **Q.** And these downgrades would not be feasible without
22 compromising the experience of the game; right?

23 **A.** I think our developers would work hard to preserve the
24 experience of the game play above all else so the tradeoffs
25 would be prioritized to preserve the game play feel and the

BOOTY - DIRECT / CALLAN

1 experience as much as possible.

2 Q. But you would be essentially creating a different game;
3 correct?

4 A. We would try to keep it as true to the original as
5 possible. I would expect there would be significant
6 differences, yeah.

7 Q. I'd like to turn to the topic of cloud gaming.

8 Cloud gaming allows you to stream a game from the cloud to
9 a local device; correct?

10 A. Yes.

11 Q. Microsoft offers cloud gaming?

12 A. Yes.

13 Q. And that's sometimes referred to as xCloud?

14 A. Correct.

15 Q. And Nvidia also offers cloud gaming; correct?

16 A. That's correct.

17 Q. And that service is called GeForce NOW?

18 A. That's right.

19 Q. I'd like you to turn to PX4351 in your binder.

20 A. (Witness examines document.)

21 Q. That is an e-mail chain dated March 26th, 2021, with the
22 subject line "Bethesda Titles on Nvidia GeForce NOW"; correct?

23 A. That's correct.

24 Q. And you are an author and recipient of the e-mails
25 contained in PX4351?

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1 **A.** That's right.

2 **Q.** Please look at your e-mail on PX4351-002. You will see
3 those numbers marked on the bottom right-hand corner of the
4 page.

5 **A.** I see it.

6 **Q.** You sent this e-mail to the CEO of Microsoft Gaming among
7 others; correct?

8 **A.** Correct.

9 **Q.** And you provide truthful and accurate information to
10 Mr. Spencer?

11 **A.** Yes.

12 **Q.** And you wrote, quote (as read):

13 "We have pulled all XGS titles from GeForce NOW so as
14 not to compete with xCloud."
15 Right?

16 **A.** I did.

17 **Q.** And "XGS" means Xbox Game Studios?

18 **A.** That's right.

19 **Q.** You went on to write (as read):

20 "I would recommend that in the absence of any other
21 plans that we do the same for Bethesda titles."
22 Right?

23 **A.** That's right.

24 **Q.** And this was in March 2021; correct?

25 **A.** That's correct.

BOOTY - DIRECT / CALLAN

1 **Q.** And this was after Microsoft acquired the Bethesda titles
2 that same month; correct?

3 **A.** Yes. I believe the exact day and date, but it was that
4 month, that's correct, yeah.

5 **Q.** Please turn to your e-mail on the page ending 001 in the
6 middle of the page.

7 **A.** Okay.

8 **Q.** The third line you wrote, quote (as read):

9 "We are not putting our first-party IP on competing
10 streaming or subscription services."

11 Correct?

12 **A.** I see that.

13 **Q.** You wrote that?

14 **A.** I did.

15 **Q.** And "first-party IP" here means first-party games; right?

16 **A.** That's right.

17 **Q.** And at the end of this e-mail you wrote "No effing way";
18 correct?

19 **A.** I did.

20 **MS. CALLAN:** Your Honor, I move to admit PX4351 into
21 evidence?

22 **THE COURT:** 4351 admitted.

23 (Trial Exhibit 4351 received in evidence.)

24 **BY MS. CALLAN:**

25 **Q.** You can set that document aside.

BOOTY - DIRECT / CALLAN

1 Tim Stuart is the president of Xbox; correct?

2 A. That's correct.

3 Q. And you give Mr. Stuart truthful and accurate information?

4 A. I do.

5 Q. I'd like you to turn to PX1442.

6 A. (Witness examines document.)

7 Q. PX1442 is an e-mail chain dated October 15th, 2019, with
8 the subject line, quote, "Preview for Friday 3 PPP Content
9 Investments"; is that right?

10 A. That's right.

11 Q. And you are the author of the e-mail at the top of PX1442?

12 A. Yes.

13 Q. And in the third line from the bottom of your e-mail you
14 wrote that "Netflix lost money for years chewing through
15 startup funding"; right?

16 A. It does say that.

17 Q. You wrote that?

18 A. I did.

19 Q. And then the next sentence is redacted for the public but
20 it starts with "Game." Do you see that?

21 A. I do.

22 Q. And you wrote that sentence; correct?

23 A. Yes.

24 Q. And then the last sentence you wrote (as read):

25 "But I think the idea is to create a moat that nobody

BOOTY - DIRECT / CALLAN

1 else can attack."

2 Correct?

3 **A.** That's what it says, yes.

4 **Q.** And you wrote that?

5 **A.** Yes.

6 **MS. CALLAN:** Your Honor, I move to admit PX1442 into
7 evidence.

8 **THE COURT:** 1442 admitted.

9 (Trial Exhibit 1442 received in evidence.)

10 **BY MS. CALLAN:**

11 **Q.** Mr. Booty, I'd like you to turn to PX4352.

12 **A.** (Witness examines document.)

13 **Q.** PX4352 is an e-mail chain dated December 17, 2019, with
14 the subject line "GP ARPU"; correct?

15 **A.** That's right.

16 **Q.** You are the author of the e-mail at the top of PX4352?

17 **A.** Yes.

18 **Q.** And this is an e-mail to Xbox CFO Tim Stuart; correct?

19 **A.** That's right.

20 **Q.** And "GP" here means Game Pass?

21 **A.** Yes.

22 **Q.** And "ARPU" means average revenue per user?

23 **A.** Yes.

24 **Q.** In the second-to-last-sentence of the first full paragraph
25 on 001, you wrote (as read):

BOOTY - CROSS / KILARU

1 "Content is the one moat that we have in terms of a
2 catalog that runs on current devices and capability to
3 create new." Correct?

4 **A.** That's right.

5 **Q.** And then you wrote (as read):

6 "Sony is really the only other player who could
7 compete with Game Pass and we would have a two-year and
8 10M subs lead."

9 Correct?

10 **A.** That's right.

11 **Q.** And "10M" means 10 million; correct?

12 **A.** Yes.

13 **MS. CALLAN:** Your Honor, I move to admit PX4352 into
14 evidence?

15 **THE COURT:** Admitted.

16 (Trial Exhibit 4352 received in evidence.)

17 **MS. CALLAN:** And I have no further questions at this
18 time.

19 **THE COURT:** Thank you.

20 (Pause in proceedings.)

21 **MR. KILARU:** Rakesh Kilaru for Microsoft, Your Honor.

22 **THE COURT:** Go ahead.

23 **CROSS-EXAMINATION**

24 **BY MR. KILARU:**

25 **Q.** Good morning, Mr. Booty.

BOOTY - CROSS / KILARU

1 **A.** Good morning.

2 **Q.** I'd like to pick up with the e-mails that you were just
3 asked about.

4 Thank you.

5 Do you recall when those e-mails were from?

6 **A.** 2019.

7 **Q.** And at the time how were you and Xbox thinking about
8 content in the video game industry?

9 **A.** We were discussing a lot of options and exploring what
10 would be the best way to go forward as we saw the landscape
11 changing for the role that content plays in our strategy and in
12 our business.

13 **Q.** And was there an analogy in your mind that you were
14 drawing when you were going through this thought experiment?

15 **A.** Oftentimes we would look at Netflix as a potential example
16 of video on demand streaming as perhaps models for how things
17 had changed over time for that industry.

18 **Q.** Was there an idea that Netflix had raced out to a lead at
19 that time?

20 **A.** We looked at what they were doing with their spend on
21 content and how they were building a content portfolio and
22 seeing if there were things to learn from that.

23 **Q.** And have those views of 2019 proved to be correct as the
24 industry has evolved over the last three years?

25 **A.** I would say no, but thinking at the time that content

BOOTY - CROSS / KILARU

1 would be some sort of durable advantage, I think has not proven
2 true and it has not proven as a barrier to competitors entering
3 the field.

4 Q. And does Xbox have competitors in subscription gaming?

5 A. It does.

6 Q. Who are those competitors?

7 A. The first that comes to mind is Sony with their PS Now
8 subscription.

9 Q. You were also asked about some e-mails from 2019 regarding
10 negotiations with Nvidia. Do you remember that?

11 A. I do.

12 Q. Has anything changed since then in terms of Xbox's
13 relationship with Nvidia?

14 A. Yeah. We've signed a number of deals to bring a large
15 part of our portfolio to their streaming service.

16 Q. Okay. Let's take a step back for a minute and talk more
17 about the game development.

18 Is that the line of work you're in, Mr. Booty?

19 A. That's right.

20 Q. And what is game development?

21 A. The design, software, creation, art, assets, as well as
22 publishing, shipping video games.

23 Q. And how long have you been working in game development?

24 A. For over 30 years.

25 Q. Could you give just a very brief overview of the positions

BOOTY - CROSS / KILARU

1 you've had?

2 **A.** I joined Microsoft in 2010. Led a number of individual
3 teams. Worked on games for Windows phone.

4 In 2014 I was one of the leads on the acquisition of
5 Mojang who make Minecraft. Personally led that franchise for
6 four years. Took the role that I'm in now in 2018.

7 Prior to that, coming out of university, I worked at a
8 place Midway Games in Chicago, worked as a software developer,
9 game designer, eventually ran studios, and ended as the CEO of
10 that company.

11 **Q.** Do you oversee all of Xbox's studios that they own?

12 **A.** I oversee roughly half today of the part that we would put
13 under the umbrella of Xbox Game Studios, XGS. That is separate
14 from the ZeniMax Bethesda studios, which do not report directly
15 to me.

16 **Q.** Who do they report to?

17 **A.** To Phil Spencer.

18 **Q.** Does Xbox Game Studios bear the costs of the games that it
19 develops?

20 **A.** We do.

21 **Q.** They go on your budget?

22 **A.** Yes.

23 **Q.** Just a few questions about the game development process.

24 In your experience, does the size of the budget for a game
25 guarantee its success?

BOOTY - CROSS / KILARU

1 **A.** No.

2 **Q.** How about the term "franchise"? Is that a term that
3 you've used or think about in game development?

4 **A.** We do. Franchise often refers to a game that has had a
5 number of releases and sequels. It might include different
6 types of games under one banner. It also could include things
7 like books, movies, cartoons, toys that are part of that
8 franchise.

9 **Q.** And does being part of an established franchise ensure
10 that a game is going to keep being successful?

11 **A.** No. I would say that each release in a franchise has --
12 is up against just the same sort of odds of being successful as
13 any previous release.

14 **Q.** And last question on this topic.

15 From your perspective as a game developer, are there
16 reasons why you'd want to make a game exclusive that relate to
17 the technical development of the game?

18 **A.** In terms of technical development, if a game is built on a
19 proprietary engine, meaning that it was developed in-house for
20 a specific purpose, in general those engines can be more
21 difficult to take to a broader number of platforms compared to
22 if a game is built using a commercial game engine where the
23 creator of that game engine is responsible for doing all the
24 low-level work to make it run on different hardware.

25 **Q.** Just to give a little explanation, what is a game engine?

BOOTY - CROSS / KILARU

1 **A.** It's the underlying foundational software that is often
2 used as a starting point to put the actual game play assets on
3 top of.

4 **Q.** And why would a proprietary versus a commercial game
5 engine make a difference in exclusivity?

6 **A.** Well, again, oftentimes proprietary engines are purpose
7 built for a certain kind of game that has certain kind of
8 demands, for example, a racing game or some first-person
9 shooter games; and once that engine has been optimized for that
10 specific-use case, it can be more difficult to make the changes
11 that are needed for it to run on newer hardware or more
12 complicated hardware.

13 **Q.** You were asked some questions about developing games for
14 Nintendo. Do you remember that?

15 **A.** Yes.

16 **Q.** Have you developed games that have shipped on Nintendo?

17 **A.** Yes.

18 **Q.** And have those games been successful?

19 **A.** Yes.

20 **Q.** Could you give us some examples?

21 **A.** We shipped many iterations of the base Minecraft game on
22 the Switch, and we also launched expansions to Minecraft, for
23 example, Minecraft Dungeons and Minecraft Legends. Minecraft
24 Dungeons has been as successful on Switch as it has been on
25 other platforms.

BOOTY - CROSS / KILARU

1 Q. Now I'd like to talk about Sony for a little bit.

2 Is Sony a competitor to Xbox?

3 A. Yes.

4 Q. And do you perceive them as having an advantage in the
5 marketplace?

6 A. Based on financial results, yes.

7 Q. And do you have a sense of how much Xbox has spent on
8 content, including acquisitions, over the last four years?

9 A. Well over \$10 billion.

10 Q. And has that been able to cut into Sony's advantage?

11 A. Not based on current state, no.

12 Q. Do you also ship games on the Sony platform?

13 A. Yes, we do.

14 Q. Do you have a rough sense of how many?

15 A. If we were to take all of the games that our studios have
16 shipped on PlayStation over time, that would be several dozen.

17 Q. Can I turn your attention to PX5045? It's actually in a
18 separate binder. If I can give that to you.

19 (Pause in proceedings.)

20 **BY MR. KILARU:**

21 Q. What's this document that's in front of you, Mr. Booty?

22 A. This is a list of the games that I just mentioned. This
23 is a list of games that have shipped on PlayStation from
24 studios that we've acquired both pre- and post-acquisition.

25 Q. And did you prepare this list?

BOOTY - CROSS / KILARU

1 **A.** I did.

2 **Q.** Do you have personal knowledge of all the games studios
3 and release dates on this document?

4 **A.** In particular the games that have been released
5 post-acquisition, but I'm familiar with all of them.

6 **Q.** If I asked you to, could we walk through these one by one
7 and establish the title and release date?

8 **A.** Probably, yes.

9 **MR. KILARU:** Your Honor, we'd offer 5045.

10 **THE COURT:** Can you tell me why some are highlighted?

11 **MR. KILARU:** We're going to get into that. I'm happy
12 to do that first if you like.

13 **THE COURT:** All right. 5045 admitted.

14 (Trial Exhibit 5045 received in evidence.)

15 **BY MR. KILARU:**

16 **Q.** I see there are two colors on the sheet, Mr. Booty. Could
17 you explain what the white -- the games labeled in white are?

18 **A.** Those are games that shipped on PlayStation by these
19 studios prior to our acquisition of them.

20 **Q.** And has Xbox continued to support these games on
21 PlayStation after the acquisition?

22 **A.** We have.

23 **Q.** Have you ever received any complaints from Sony about the
24 quality of the games?

25 **A.** No.

BOOTY - CROSS / KILARU

1 Q. Ever receive any complaints that you were keeping content
2 away from them or giving their gamers a worse experience?

3 A. No.

4 Q. Now, some of the rows are yellow. What does that signify?

5 A. This indicates games that have shipped on PlayStation
6 after we acquired the studio.

7 Q. And for all of those games, did you ever receive any
8 complaints from Sony about the development process?

9 A. No.

10 Q. How about the quality of the game?

11 A. No.

12 Q. Ever receive any complaints that you were keeping content
13 away from them or giving their fans a worse experience?

14 A. No.

15 Q. We're done with that document for now.

16 Just one last topic. You were asked about a game called
17 Minecraft. Could you just explain what Minecraft is?

18 A. At its core Minecraft is a game that involves building
19 with blocks and exploring worlds that have been built with
20 those blocks.

21 Q. And when did you start working on Minecraft?

22 A. In 2014.

23 Q. Would you call Minecraft a franchise?

24 A. At this point, yes.

25 Q. And does it have multiplayer capabilities?

BOOTY - CROSS / KILARU

1 **A.** It does.

2 **Q.** When Xbox acquired Minecraft, do you recall -- Mojang,
3 excuse me -- do you recall what platforms Minecraft was on?

4 **A.** At that point in time, I believe it was PC and the console
5 version had launched on Xbox.

6 **Q.** Was it also available on the PlayStation?

7 **A.** I believe so, yes.

8 **Q.** In developing Minecraft, do you allow cross play between
9 Xbox and PlayStation consoles?

10 **A.** We do.

11 **Q.** Okay. Since acquiring Minecraft, has Xbox increased
12 access to the game or decreased access to the game in terms of
13 platform?

14 **A.** I think we've greatly increased. We've taken it to the
15 Nintendo Switch and have launched it on platforms ranging from
16 the Kindle to Chromebooks. So quite a number of platforms.

17 **Q.** You mentioned that Minecraft is a franchise. Have you
18 released any new games in that franchise since acquiring
19 Mojang?

20 **A.** We have. In 2020 we launched a game called Minecraft
21 Dungeons, which was a standalone game in that world but a
22 different kind of game play. And earlier this year we launched
23 Minecraft Legends, also a different kind of game and a
24 standalone game but part of the franchise.

25 **Q.** Did you launch both of those games post-acquisition on the

BOOTY - CROSS / KILARU

1 PlayStation?

2 **A.** We did.

3 **Q.** And on the Switch as well?

4 **A.** Yes.

5 **Q.** And have you ever received any complaints or concerns from
6 Sony about the quality of the Minecraft games you're shipping?

7 **A.** No. We have a great working relationship with them as it
8 pertains to Minecraft.

9 **Q.** How about any concerns about the development process?

10 **A.** No.

11 **Q.** Any claims that you are withholding content from them or
12 giving their users a worse experience?

13 **A.** No.

14 **Q.** How would you characterize your relationship with Sony in
15 terms of working together on game development?

16 **A.** I think it's a very cordial and productive relationship.
17 We have a team that are assigned to us as account managers and
18 we meet with them regularly to talk about the road map for
19 Minecraft, and find it a good working relationship.

20 **Q.** Have you ever received any praise from Sony for the work
21 you've done together?

22 **A.** They generally seem pleased and thankful for the
23 partnership; and as a token of that, when they released a
24 commemorative PlayStation 4 edition for the number of units
25 that they sold they, the then head of third-party sent one to

BOOTY - CROSS / KILARU

1 me, which was kind of special, saying that they were sending it
2 to -- out of appreciation for the work that we had done with
3 them.

4 **Q.** Did he ask you to do anything with that unit?

5 **A.** He did include a memo saying I should display it proudly
6 in the hallway.

7 (Laughter)

8 **MR. KILARU:** Just one moment, Your Honor.

9 (Pause in proceedings.)

10 **MR. KILARU:** Nothing further from us at this time.

11 **THE COURT:** Okay. I just have a couple questions.

12 When you say you can play Xbox and PlayStation, play
13 Minecraft together multiplayer but not with the Switch or the
14 PC?

15 **THE WITNESS:** No, we allow multiplayer across all
16 those platforms.

17 **THE COURT:** All those platforms. So one person could
18 be on the Switch and one person could be on the Xbox or
19 PlayStation and still be playing against each other?

20 **THE WITNESS:** Yes, Your Honor, that's right.

21 **THE COURT:** And then you said that your views from
22 2019 as to content changed. Why? Like, what happened?

23 **THE WITNESS:** Well, the thinking, as we were thinking
24 through a number of aspects of our strategy, were content, as I
25 mentioned, would be this durable advantage; and since then, I

BOOTY - CROSS / KILARU

1 think we've seen that while content is absolutely important to
2 a strategy, it is -- it really isn't a durable advantage, that
3 others can enter a field and that others can build content
4 libraries fairly quickly.

5 **THE COURT:** Why? Can you give me an example of why
6 you came to that conclusion?

7 **THE WITNESS:** That I come to the conclusion today?

8 **THE COURT:** Yes.

9 **THE WITNESS:** Well, within our industry, for example,
10 I would say that Disney has been able to become a competitor to
11 Netflix through acquisition and building a fairly large content
12 library.

13 The other thing is that, as Mr. Kilaru indicated, there's
14 no guarantee of success for a game just because of its existing
15 franchise or catalog. So at any point in time a game that we
16 build could be an outsized hit or it could also fall flat and
17 be a failure.

18 So at its core we are in the entertainment business and
19 there are really no guarantees, which means there are a number
20 of openings and opportunities for other people to launch
21 content that's very successful and that people who have been in
22 the business for a while may find that a long-running franchise
23 suddenly falls flat.

24 **THE COURT:** All right. Thank you.

25 Any further questions.

BOOTY - REDIRECT / CALLAN

REDIRECT EXAMINATION

BY MS. CALLAN:

Q. Mr. Booty, Microsoft's counsel showed you RX5045; right?

A. Yes.

MS. CALLAN: And, Your Honor, I just want to be clear that that document is a demonstrative.

BY MS. CALLAN:

Q. Mr. Booty when was RX5045 created?

A. I believe this was created within the last several months.

Q. Who created it?

A. The initial data was put together by members of my team, and I created the final document.

Q. Okay. And every game on the first page was released on PlayStation before Microsoft acquired the studio; correct?

A. That's correct.

Q. And the games that are highlighted on the second page are the only games on this list that were released after Microsoft acquired the studio; correct?

A. That's correct.

Q. And of those games, how many were in development at the time of the acquisition?

A. Many of them were but, for example, Minecraft Legends was not. Minecraft Dungeons was not. The others were.

Q. Can you identify any other games that were not in development at the time of the acquisition?

BOOTY - REDIRECT / CALLAN

1 **A.** Of the ones highlighted in yellow, no.

2 **Q.** And so Ghostwire Tokyo and Deathloop, for example, were
3 already in development for PlayStation when Microsoft purchased
4 ZeniMax; correct?

5 **A.** That's correct.

6 **Q.** And ZeniMax actually had a contract to release Ghostwire
7 Tokyo and Deathloop on PlayStation?

8 **A.** Yes.

9 **Q.** And, for example, Outer Worlds was already in development
10 for PlayStation when Microsoft purchased Obsidian?

11 **A.** That's correct.

12 **Q.** Obsidian had a preexisting contract to release
13 Outer Worlds on PlayStation; right?

14 **A.** Yes.

15 **Q.** And Outer Worlds 2 has been announced?

16 **A.** Yes.

17 **Q.** And Outer Worlds 2 will not be available on PlayStation;
18 correct?

19 **A.** I don't know that that decision has been made yet, but
20 that's not an absolute, no. In general, games that have
21 launched on PlayStation and have a community there, a principle
22 of ours is that we will continue to ship it on those platforms.

23 **Q.** Obsidian released a game called Pentiment in
24 November 2022; is that correct?

25 **A.** That's correct.

BOOTY - REDIRECT / CALLAN

1 Q. And Pentiment is not available on PlayStation?

2 A. Currently, no, that's correct.

3 Q. And Obsidian released a game called Grounded in September
4 2022; correct?

5 A. That's correct.

6 Q. And Grounded is not available on PlayStation?

7 A. Not currently, no.

8 Q. And Obsidian is working on a game called Avowed; is that
9 right?

10 A. That's right.

11 Q. And Avowed will not be available on PlayStation; right?

12 A. Not currently, no.

13 Q. And some of the games on this list are actually expansion
14 packs and not new games; correct?

15 A. That's correct. Although in the case, for example, of the
16 Elder Scrolls expansions, given the yearly release and the
17 nature of those, they are quite big and considered by the fans
18 to be equivalent to a game release.

19 Q. But the game itself, Elder Scrolls online, that was
20 already available on PlayStation when Microsoft acquired
21 ZeniMax; correct?

22 A. That's correct.

23 Q. You can set that document aside.

24 You mentioned a deal that Microsoft signed with Nvidia to
25 bring games to GeForce NOW; correct?

BOOTY - REDIRECT / CALLAN

1 **A.** That's right.

2 **Q.** That agreement was signed in 2023; right?

3 **A.** I believe so. I was not involved in the proceedings or
4 any of the negotiations with that.

5 **Q.** But it was signed after the FTC sued to block the
6 transaction; correct?

7 **A.** Again, I wasn't involved, but I think generally that's
8 right.

9 **Q.** And Microsoft did not enter into any agreements to put its
10 first-party content on Nvidia prior to a few months ago; is
11 that right?

12 **A.** I don't know that that's -- that there aren't outlying
13 exceptions of one or two titles to that, but I think generally
14 that's accurate.

15 **Q.** And you had said, "No effing way"; right?

16 **A.** That was my intention about putting future titles. I was
17 fairly frustrated with Nvidia at the time, but obviously we've
18 signed deals with them now.

19 **Q.** And you testified that Microsoft spent roughly \$10 billion
20 acquiring content in the last four years; correct?

21 **A.** That's right.

22 **Q.** And you testified that that did not affect market share;
23 correct?

24 **A.** I don't have the exact numbers in hand, but the question
25 was, you know, has it changed Sony's lead position in the

BOOTY - RECROSS / KILARU

1 industry, and I believe it has not.

2 **Q.** But Microsoft now wants to spend \$70 billion to purchase
3 content from Activision; is that right?

4 **A.** That's right.

5 **MS. CALLAN:** No further questions.

6 **MR. KILARU:** A few?

7 **THE COURT:** Yeah.

8 **RECROSS-EXAMINATION**

9 **BY MR. KILARU:**

10 **Q.** Mr. Booty, on the topic of Nvidia, could you explain why
11 in 2019 you did not want games to go on the GeForce service?

12 **A.** I was frustrated with the process. We did not have clear
13 deals in place with Nvidia for the use of our IP, and they were
14 putting games onto their service in some cases without our
15 permission, which in general we frown on. And I was frustrated
16 with the lack of clarity and that they were doing this at the
17 time. Obviously since then the relationship has changed quite
18 a bit.

19 **Q.** You were also asked about whether several of the games on
20 the chart in front of you were under contract to PlayStation at
21 the time of an acquisition. Do you remember that?

22 **A.** Yes.

23 **Q.** Did Xbox honor those contracts?

24 **A.** We did.

25 **MR. KILARU:** Nothing further, Your Honor.

HINES - DIRECT / FLEURY

1 **THE COURT:** Okay. You may step down.

2 So we'll take a 15-minute break and resume with the next
3 witness then.

4 (Recess taken at 10:11 a.m.)

5 (Proceedings resumed at 10:33 a.m.)

6 **THE CLERK:** Remain seated. Come to order.

7 (Pause in proceedings.)

8 **THE COURT:** All right. Is the FTC prepared to call
9 your next witness?

10 **MR. WEINGARTEN:** Yes, Your Honor. The FTC calls
11 Mr. Pete Hines, and the examination will be conducted by my
12 colleague Jenny Fleury.

13 **THE COURT:** All right. Good morning, Ms. Fleury.

14 **MS. FLEURY:** Good morning, Your Honor. It's actually
15 morning still, I believe.

16 **THE CLERK:** There is still some morning.

17 (Pause in proceedings.)

18 **THE COURT:** Mr. Hines, if you can stop right there.

19 **PETER HINES,**
20 called as a witness for the Plaintiff, having been duly sworn,
21 testified as follows:

22 **THE CLERK:** Can you please state your name for the
23 record?

24 **THE WITNESS:** Peter Hines.

25 **THE CLERK:** Thank you.

HINES - DIRECT / FLEURY

1 **THE COURT:** You may be seated.

2 **THE WITNESS:** Thank you.

3 **DIRECT EXAMINATION**

4 **BY MS. FLEURY:**

5 **Q.** Good morning, Mr. Hines.

6 **A.** Good morning.

7 **Q.** You were the head of publishing for Bethesda Softworks?

8 **A.** That is my current role.

9 **Q.** Bethesda Softworks is a game publisher that also owns
10 eight development studios; correct?

11 **A.** Correct.

12 **Q.** ZeniMax is the parent company of Bethesda?

13 **A.** Yes.

14 **Q.** The term "ZeniMax" would include Bethesda, the publisher,
15 as well as all eight development studios; right?

16 **A.** Okay.

17 **Q.** You were part of the ZeniMax leadership group?

18 **A.** Yes.

19 **Q.** You report to the CEO of ZeniMax Jamie Leder?

20 **A.** Correct.

21 **Q.** Microsoft acquired ZeniMax in 2021; correct?

22 **A.** Yes.

23 **Q.** Since Microsoft acquired ZeniMax, you now ultimately
24 report up to Phil Spencer, the CEO of Microsoft Gaming?

25 **A.** Sorry. You mean ZeniMax does?

HINES - DIRECT / FLEURY

1 **Q.** You personally ultimately report up to Phil Spencer?

2 **A.** I never really thought about it, but...

3 (Laughter)

4 **THE WITNESS:** I mean we're a limited integration
5 company, so technically I don't even know how that works.

6 **BY MS. FLEURY:**

7 **Q.** Could you turn in the book that you have right in front of
8 you --

9 **A.** Uh-huh.

10 **Q.** -- to page 65 of your deposition transcript?

11 **A.** Okay.

12 **Q.** That will be the first tab.

13 **A.** (Witness examines document.)

14 **Q.** And on line 21 it says (as read):

15 **"QUESTION:** Whether directly or indirectly, does he report
16 to Phil Spencer?

17 **"ANSWER:** My understanding is that directly or indirectly
18 everybody under Xbox reports in to Phil Spencer
19 eventually."

20 And if you turn the page (as read):

21 **"QUESTION:** That would include Mr. Leder?

22 **"ANSWER:** Correct.

23 **"QUESTION:** That would also include you?

24 **"ANSWER:** Correct."

25 Do you see that?

HINES - DIRECT / FLEURY

1 **A.** I do.

2 **Q.** And that testimony was truthful and accurate when you gave
3 it?

4 **A.** Yes.

5 **Q.** Mr. Hines, you started working for ZeniMax in 1999;
6 correct?

7 **A.** Yes.

8 **Q.** You view ZeniMax as the Pixar of gaming; correct?

9 **A.** I've used that reference more in terms of Bethesda but,
10 yes, in general I consider us as sort of a Pixar of gaming,
11 yes.

12 **Q.** ZeniMax makes big AAA tentpole games?

13 **A.** Yes.

14 **Q.** ZeniMax produces some of the best AAA games in the world
15 in your view?

16 **A.** I like to think so, yes.

17 **Q.** And the gaming company that in your view is most like
18 ZeniMax is Blizzard; correct?

19 **A.** I recall saying that in context specifically to Activision
20 Blizzard King, but I would agree Blizzard is a lot like us,
21 yes.

22 **Q.** Blizzard is one of the three divisions at Activision?

23 **A.** Correct, yes, ma'am.

24 **Q.** And blizzard makes the game franchises Diablo and
25 Overwatch; is that right?

1 **A.** Yes.

2 **Q.** Before it was acquired by Microsoft, ZeniMax had an
3 incentive to distribute its games on more than one platform;
4 would you agree?

5 **A.** Yes.

6 **Q.** Over the ten-year period before the Microsoft acquisition,
7 ZeniMax games were, by and large, released on more than one
8 platform; correct?

9 **A.** Correct.

10 **Q.** In fact, before the Microsoft acquisition, ZeniMax had
11 never released a game for just one console; correct?

12 **A.** Um, in general that -- I mean, I can explain, but in
13 general, yes, that's correct.

14 **Q.** At the time the ZeniMax deal was announced, the
15 acquisition of ZeniMax by Microsoft, it was considered a
16 massive and historic deal; is that correct?

17 **A.** Correct.

18 **Q.** You thought it was the biggest deal in the gaming industry
19 since the Activision-Vivendi deal in 2008; is that correct?

20 **A.** Correct.

21 **Q.** And the purchase price for the ZeniMax deal was
22 7.5 billion; correct?

23 **A.** Correct.

24 **Q.** Before ZeniMax was acquired by Microsoft, there were some
25 games that ZeniMax had already contractually committed to put

1 on PlayStation; correct?

2 A. I'm sorry. Ask that again.

3 Q. Before ZeniMax was acquired by Microsoft, there were some
4 games that ZeniMax had already contractually committed to put
5 on PlayStation --

6 A. Yes.

7 Q. -- correct?

8 A. Yes.

9 Q. ZeniMax had a timed exclusivity agreement with Sony
10 PlayStation for Deathloop and Ghostwire; correct?

11 A. Correct.

12 Q. I'd like to shift gears for a moment, Mr. Hines, and ask
13 you some questions about xCloud.

14 A. Okay.

15 Q. Just a reminder, Microsoft's cloud gaming service is
16 called xCloud; correct?

17 A. Yes.

18 Q. And xCloud will run on nearly any computer; correct?

19 A. Yes.

20 Q. In order to access xCloud through your devices, you have
21 to purchase a Game Pass subscription from Microsoft; correct?

22 A. Yes.

23 Q. In the same way that you can watch Netflix on just about
24 any device, once you're a subscriber, same goes for Game Pass
25 subscriptions; correct?

1 A. Yes.

2 Q. You can turn on a television that has the Xbox Game Pass
3 app and start playing video games without owning any kind of
4 console; correct?

5 A. Yes.

6 Q. And you personally, Mr. Hines, have used xCloud to play
7 games?

8 A. Yes.

9 Q. And you continue to do so on a regular basis?

10 A. Correct.

11 Q. ZeniMax released games on cloud streaming services before
12 the Microsoft acquisition; correct?

13 A. Yes. Yes.

14 Q. I'd like to ask you about another game not made by
15 ZeniMax. You are familiar with Minecraft?

16 A. Yes.

17 Q. And Minecraft is a Sandbox game; correct?

18 A. Yes.

19 Q. So that means players have the freedom to go wherever they
20 want and do whatever they want; right?

21 A. In a manner of speaking, sure.

22 Q. ZeniMax doesn't make anything that's like Minecraft;
23 correct?

24 THE COURT: Can I ask you what mean by "go anywhere"?

25 You mean within the game you go anywhere you want?

HINES - DIRECT / FLEURY

1 **MS. FLEURY:** Mr. Hines might be in a better position
2 to answer this question. Feel free.

3 **THE WITNESS:** It's a -- it's a game that doesn't tell
4 the players what to do. The players get to decide where they
5 want to go, how they want to play the game as opposed to --

6 **THE COURT:** Within the game?

7 **THE WITNESS:** Within the game, yes.

8 **THE COURT:** Okay. Not where they're playing the game
9 but within the game?

10 **THE WITNESS:** Correct, yeah.

11 **BY MS. FLEURY:**

12 **Q.** So ZeniMax doesn't make anything like that that's like
13 Minecraft; correct?

14 **A.** Not in my opinion, no.

15 **Q.** In fact, there's really nothing else like Minecraft in
16 that respect; correct?

17 **A.** I'm not entirely sure I agree with that, but there have
18 been other companies that have tried to do things similar to
19 Minecraft. Not us, but...

20 **Q.** Are you referring to Roblox?

21 **A.** Games like Roblox was one that popped in my head, yes.

22 **Q.** Other than with the possible exception of Roblox, there's
23 really nothing else like Minecraft?

24 **A.** True.

25 **Q.** Now I'd like to ask you about some ZeniMax games.

1 **A.** Okay.

2 **Q.** Redfall is a ZeniMax AAA shooter game; correct?

3 **A.** There might be some opinions about the AAA part, but that
4 was certainly our intent, yes.

5 **Q.** Redfall is a co-op game; correct?

6 **A.** Correct.

7 **Q.** Co-op means you can play it with other people if you want
8 to?

9 **A.** We specifically use co-op to reference when people are
10 playing together against the game.

11 **Q.** Redfall is a cooperative multiplayer game; correct?

12 **A.** Yes.

13 **Q.** And Redfall was designed so you can play it cross
14 platform; correct?

15 **A.** Yes.

16 **Q.** In fact, Redfall had a marketing slogan and -- please
17 excuse my language -- "Kick vampire ass with friends"?

18 **A.** Yes.

19 **Q.** ZeniMax is releasing a AAA game called Starfield later
20 this year; correct?

21 **A.** Yes.

22 **Q.** Starfield is a Microsoft exclusive; correct?

23 **A.** It is for PC and Xbox only, yes.

24 **Q.** After the Microsoft acquisition, you announced Starfield
25 as PC and Microsoft -- sorry -- PC and Xbox exclusive; correct?

HINES - DIRECT / FLEURY

1 **A.** Yes.

2 **Q.** When Starfield was announced, PlayStation 5 fans were
3 upset about the fact that it would be exclusive; correct?

4 **A.** Correct.

5 **Q.** And it bothered you, Mr. Hines, that PlayStation fans were
6 upset about Starfield exclusivity?

7 **A.** I -- it bothered me that they were upset.

8 **Q.** As part of your work for ZeniMax, you appear in YouTube
9 videos? Interviews?

10 **A.** In interviews, yes.

11 **Q.** And you tell the truth in your public statements as part
12 of your work for ZeniMax?

13 **A.** I do.

14 **Q.** You conducted one such YouTube interview with Mr. Hussain
15 of GameSpot on June 16th, 2021; correct?

16 **A.** That sounds correct, yes.

17 **Q.** And that was regarding Microsoft's acquisition of ZeniMax;
18 correct?

19 **A.** Yes.

20 **MS. FLEURY:** Charles, would you mind bringing up the
21 screenshot?

22 (Pause in proceedings.)

23 **BY MS. FLEURY:**

24 **Q.** This is -- I'm going to show you what has been marked as
25 PX9186A.

HINES - DIRECT / FLEURY

(Pause in proceedings.)

BY MS. FLEURY:

Q. When it comes up, this is a publicly available video from an interview that you did, as we discussed, with Tamoor Hussain of GameSpot on June 16th, 2021; correct?

A. Yes.

MS. FLEURY: Your Honor, we may be having technical difficulty.

THE COURT: Are you going to play it?

MS. FLEURY: I was going to play a small portion of it.

THE COURT: Do you want to admit it? Is there any objection?

MS. HILL: No objection, Your Honor.

THE COURT: 9168A admitted.

(Trial Exhibit 9186A received in evidence.)

(Video was played but not reported.)

BY MS. FLEURY:

Q. That's the interview you conducted with Mr. Hussain; correct?

A. Yes.

Q. I want to pause for a second and ask you, when you release a game, like the games you were discussing with Mr. Hussain, on Game Pass day and date, you might get less revenue from people who aren't buying the game separately; correct?

1 **A.** Correct.

2 **Q.** But actually you get such a crazy number of additional
3 players in Game Pass who you can monetize; correct?

4 **A.** Um, you have the -- you have the -- there's a possibility.
5 It's important to note, not all games plan to take advantage of
6 that. Not all games plan to monetize players the same.

7 **Q.** Let's talk about how that monetization would work.

8 Players who are Game Pass subscribers, they can purchase
9 something called bundles; correct?

10 **A.** In game items in various configurations, yes.

11 **Q.** They can purchase cool outfits?

12 **A.** Again, I can't make a general statement because there are
13 some games that do that and some games that don't.

14 **Q.** For the games that do that, they can unlock characters?

15 **A.** Yes, there are games that offer characters for sale.

16 **Q.** And when players do that, when they purchase these -- make
17 these in-game purchases, they are spending money?

18 **A.** Yes.

19 **Q.** In the game?

20 **A.** Yes.

21 **Q.** And you could end up making revenue, making up for the
22 lost revenue, off of a bunch more players through those in-game
23 purchases; correct?

24 **A.** In theory, yes.

25 **MS. FLEURY:** Charles, will you please play the second

1 part of the video?

2 (Video was played but not reported.)

3 **BY MS. FLEURY:**

4 **Q.** In this interview you were expressing your empathy to your
5 player base; correct?

6 **A.** Yes. I'm speaking specifically to -- I don't like it when
7 we do -- when our players are upset because of something we do.

8 **Q.** And you were letting them know that at least one person at
9 your company understands that they are upset; correct?

10 **A.** Correct.

11 **Q.** Starfield, the game you reference in the video, is a
12 Microsoft exclusive; correct?

13 **A.** Yes. It's for PC and Xbox only.

14 **Q.** There is no plan to make PlayStation 5 -- to make a
15 PlayStation 5 version of Starfield; correct?

16 **A.** Correct.

17 **Q.** Before the Microsoft acquisition, Disney had a signed
18 agreement with ZeniMax to make an Indiana Jones game for PC and
19 multiple consoles; correct?

20 **A.** Yes.

21 **Q.** Indiana Jones is a AAA game; correct?

22 **A.** We expect it to be, yes.

23 **Q.** After the acquisition of ZeniMax by Microsoft was
24 announced, Disney brought up the issue of which platforms it
25 was going to be on; correct?

1 A. They certainly had questions once the deal was announced,
2 yes.

3 Q. That was despite the fact that they had the signed
4 agreement for multiple consoles with ZeniMax; correct?

5 A. Correct.

6 Q. The agreement with Disney was later amended; correct?

7 A. Yes.

8 Q. And the contract was transitioned to be Xbox-PC exclusive;
9 correct?

10 A. Yes.

11 Q. Indiana Jones will be a Game Pass day one release;
12 correct?

13 A. Yes.

14 Q. When the Activision acquisition was announced, you were
15 surprised at the purchase price Microsoft agreed to pay for
16 Activision Blizzard King; correct?

17 A. It was a lot of money.

18 Q. It was a lot of billions of dollars; correct?

19 A. Correct.

20 Q. When you heard about the acquisition, you had questions
21 about whether Activision titles would be exclusive going
22 forward?

23 A. I had questions about how Activision was going to be
24 treated going forward and how, if at all, that changed how we
25 were thinking about what we were doing.

1 Q. I'd like to show you PX4406, which is in your binder.
2 This has not been marked confidential so it will also be up on
3 screen.

4 And this is an e-mail you drafted on February 10th, 2022,
5 with the subject line "Xbox Blog Post"; is that correct?

6 A. Yes.

7 Q. This draft is directed to three ZeniMax executives;
8 correct?

9 A. Yes.

10 Q. You say in the draft right at the top, quote (as read):

11 "I'm confused. Is the below not the opposite of what
12 we were told, just asked, told to do with our own titles?
13 What's the difference?"

14 Do you see that?

15 A. I do.

16 Q. And below that you reproduce a blog post that Xbox
17 released; correct?

18 A. An excerpt of it, yes.

19 Q. About Microsoft continuing to make Call of Duty and other
20 popular Activision Blizzard titles available on PlayStation
21 through the term of any existing agreement and commitments
22 beyond that; correct?

23 A. Correct.

24 Q. There's no reason you're aware of that games from
25 Activision Blizzard King should be treated differently than

HINES - DIRECT / FLEURY

1 ZeniMax games; correct?

2 **A.** I mean, in general no, I don't know why they would be
3 treated differently.

4 **MS. FLEURY:** Your Honor, I move to admit PX4406.

5 **THE COURT:** Admitted.

6 (Trial Exhibit 4406 received in evidence.)

7 **BY MS. FLEURY:**

8 **Q.** Mr. Hines, you don't know what Microsoft's policy on
9 exclusivity is; correct?

10 **A.** I'm sorry. Are we talking about right now or in reference
11 to this e-mail?

12 **Q.** Let's start in reference to that e-mail.

13 You did not know what Microsoft's policy on exclusivity
14 was; correct?

15 **A.** That's -- that's not -- this e-mail is directed at my boss
16 and two other people, and my boss is the one who gave the
17 information about exclusivity. So I'm going back to him to say
18 "This is different than what you told all of us before, and I
19 don't know how to think about this."

20 **Q.** Microsoft's public announcements on exclusivity are
21 different, in your view, from having an internal policy on
22 exclusivity; correct?

23 **A.** I'm sorry. Can you ask that again? I'm not sure I
24 understood.

25 **Q.** Sure. Microsoft's public announcements on exclusivity are

HINES - CROSS / HILL

1 different, in your view, from having an internal policy on
2 exclusivity; correct?

3 **A.** I'm sorry. I'm genuinely not sure how to answer that
4 question.

5 **Q.** There's a difference between having a commitment and a
6 policy on exclusivity in your view; correct?

7 **A.** In general, yes, I would agree with that.

8 **Q.** And a policy is an internal thing that says "This is how
9 we operate"; correct?

10 **A.** A formalized one, yes.

11 (Pause in proceedings.)

12 **MS. FLEURY:** Thank you, Mr. Hines.

13 We pass the witness.

14 **THE COURT:** Thank you.

15 **MS. HILL:** Good morning, Grace Hill for Microsoft.

16 **CROSS-EXAMINATION**

17 **BY MS. HILL:**

18 **Q.** Good morning, Mr. Hines.

19 **A.** Good morning.

20 **Q.** You testified that you are currently the head of
21 publishing for ZeniMax?

22 **A.** That is my current role, yes.

23 **Q.** And how long have you been in that role?

24 **A.** Since late last year. I'm sorry. October-November. It
25 was somewhere in there.

HINES - CROSS / HILL

1 Q. Okay. Late 2022?

2 A. Yes, ma'am.

3 Q. And what was your job before you became head of
4 publishing?

5 A. For the prior 22, whatever, since 1999, I had been in
6 charge of our global marketing and communications teams.

7 Q. Okay. So fair to say based on those dates, that you --
8 the bulk of your time at ZeniMax has been in the role of
9 marketing and -- head of marketing and communications?

10 A. Correct.

11 Q. All right. I want to ask you about the document that
12 counsel just showed you.

13 MS. HILL: And if we could bring that up. It is
14 marked PX4406.

15 (Pause in proceedings.)

16 THE WITNESS: I have it.

17 BY MS. HILL:

18 Q. Okay. Now, this document is dated February of 2022. What
19 was your role at ZeniMax at the time you wrote this draft?

20 A. I was the senior vice president of global marketing and
21 communications.

22 Q. Okay. And in the first paragraph when you wrote that the
23 blog post seemed like the opposite of what you were asked to do
24 or told to do with your own titles, what was the policy that
25 you understood you were to follow with respect to

1 decision-making about the exclusivity of future ZeniMax titles?

2 **A.** That we were going to evaluate on a case-by-case,
3 title-by-title basis what was the best approach.

4 **Q.** And has that always been the approach towards
5 decision-making for exclusivity of future ZeniMax titles?

6 **A.** I think treating games individually on a title-by-title
7 basis and what's best for those games is very much a Bethesda
8 thing. That's part of our ethos.

9 **Q.** And did that same approach carry forward after ZeniMax was
10 acquired by Microsoft?

11 **A.** We have continued to -- to obviously talk to Xbox but
12 decide for ourselves how and when we want to put our games out
13 and what we think is best for ourselves, for our teams, and to
14 give us the best chance to succeed.

15 **Q.** Okay. Counsel asked you whether there was any reason to
16 treat ZeniMax games differently from other games, for example,
17 from Activision's games. Do you think that the title-by-title
18 approach that you just described should also be applied to
19 Activision Blizzard games?

20 **A.** I mean, in fairness, I think it should be applied to every
21 game in this industry. It's not a specific thing to one.
22 Like, it's a good idea to do for everything.

23 **Q.** Now, you were also shown some clips from an interview that
24 you gave to Tamoor Hussain?

25 **A.** Uh-huh.

HINES - CROSS / HILL

1 Q. I am not going to show you clips, but I'd like you to turn
2 to PX9186.

3 A. Okay.

4 Q. Do you recognize that to be a transcript of the same
5 video?

6 A. Yes.

7 MS. HILL: We move to admit PX9186.

8 THE COURT: Any objection?

9 (No response.)

10 THE COURT: 9186 admitted.

11 (Trial Exhibit 9186 received in evidence.)

12 MS. HILL: All right. Let's pull that up, please.

13 BY MS. HILL:

14 Q. And the first clip that you were shown, we can actually
15 find the transcription for that on what's marked at the bottom
16 as 9186-004; but if it is easier for you, it is page 12 if you
17 look at the upper right-hand corners of the little quartered
18 pages.

19 A. Okay.

20 Q. Okay. At the very bottom when you were asked about
21 Starfield exclusivity, you answered how it wasn't a
22 consideration. You go to page 13 and the video clip ended at
23 (as read):

24 "You know, where -- so wherever and however that Xbox
25 ecosystem expands, obviously we're -- you know, we're

1 excited about that."

2 Do you see that?

3 **A.** I do.

4 **Q.** Okay. So the clip ended there, but I would like you to
5 continue reading the remainder of your answer to that question
6 which begins -- if you begin reading at 14 through line 23.

7 Would you mind reading that out, please?

8 **A.** Of course (as read):

9 "The flip side, the -- the other thing you asked
10 about is, like, what is the impact on development. Well,
11 I'm here to tell you -- and any dev will tell you this --
12 you go to fewer platforms, your development gets more
13 streamlined. You're not worrying about, well, how does it
14 work on this box versus how does it work on that box.
15 We're not making it on that box. So it just needs to run
16 as well as possible on this one, on a PC. You know,
17 narrow focus always helps."

18 **Q.** And you go on to give another example of a game called
19 Deathloop, which you've also testified about today. And is
20 that same point you were making about the ability to streamline
21 a game and the benefits to that game true with Deathloop as
22 well?

23 **A.** It was literally the reason why I suggested doing it in
24 the first place.

25 **Q.** By "it," you mean making Deathloop exclusive to Sony?

HINES - CROSS / HILL

1 **A.** It was the reason why I suggested we consider making
2 Deathloop an exclusive on something to streamline that
3 development.

4 **Q.** All right. And what platform was Deathloop exclusive to
5 when it first came out?

6 **A.** When it first came out, it was released on PC and
7 PlayStation 5.

8 **Q.** Now, did the decisions about Starfield and Deathloop
9 exclusivity have the support of the studios who were actually
10 making those games?

11 **A.** Yes.

12 **Q.** Let's talk about Starfield first.

13 Were you, Pete Hines, personally supportive of the
14 decision to make Starfield exclusive?

15 **A.** Yeah.

16 **Q.** Why was that?

17 **A.** Well, it's -- Todd has called it an irresponsibly large
18 game. I think it's a pretty accurate description; and as
19 someone who has been playing it a lot and sees all of the stuff
20 to do, there's no question in my mind that being able to focus
21 on fewer platforms to support, hardware to support has been a
22 big benefit to that team.

23 **Q.** What kind of benefits do you think the team has seen from
24 the ability to focus?

25 **A.** I mean, I reference it here in this transcript where I'm

1 talking about how does it work on that box; right? When you're
2 trying to figure out how to make a game look as good as it can,
3 play as smoothly as possible, your programmers really need to
4 know: Well, what am I trying to get this to run smoothly on?
5 If the way that this box does graphics is different than that
6 one, if the memory configuration is -- like, there are just so
7 many technical things that, in fairness, are way beyond my
8 expertise, but I talk to them enough to understand how these
9 implications impact the work that we do.

10 I mean, the simplest thing is, if you're going to have QA
11 test the game, the fewer platforms you have them focused on,
12 the more rounds of testing they can do. If you have a hundred
13 people testing two platforms, you can put 50 on each. If you
14 have three, like the math tells you, you have fewer people on
15 those games. It's fewer attention, you're finding fewer
16 problems, you are not going as fast. It's going to take
17 longer. It's going to cost more. There's -- it's just far
18 greater risk in my mind.

19 **Q.** And just for a quick clarification, "QA" is?

20 **A.** I'm sorry. Quality -- "QA" is quality assurance, the
21 people who play the game before it's released for our devs to
22 find all of the problems and the things that don't work right
23 so we can fix them.

24 **Q.** Okay. And I think this is safe to say because it's been
25 publicly announced, but Starfield is coming out relatively

1 soon; right?

2 **A.** I think it's September 1st.

3 **Q.** Okay. In your mind, if the game had continued -- if the
4 game were being developed, if it were coming out on
5 PlayStation, would it be coming out in September of this year?

6 **A.** It's -- in my opinion, no. Like, I don't -- we would not
7 be putting this game out in nine weeks if we were supporting an
8 entire additional platform in my opinion.

9 **Q.** All right. I'd like to ask you about the other example
10 you gave here, which was Deathloop, which you said was a
11 PlayStation exclusive when it came out.

12 How did that game perform after it was released on
13 PlayStation?

14 **A.** It was received really well by players. It got critical
15 accolades. It was nominated for awards. It was -- it was a
16 really good, fun game on release.

17 **Q.** You also testified about Ghostwire being the other title
18 that came out on PlayStation?

19 **A.** As an exclusive launch.

20 **Q.** As an exclusive, right.

21 And those were both because you had preexisting agreements
22 with Sony to do so; correct?

23 **A.** Correct.

24 **Q.** To your -- how did Ghostwire perform after it was released
25 on PlayStation?

HINES - CROSS / HILL

1 **A.** It did well. I don't -- it didn't do -- it didn't do the
2 same as Deathloop, like, it didn't get the same critical
3 acclaim; but we had a lot of players, people enjoyed it for --
4 you know, if you like that kind of game. People liked it.

5 **Q.** To your knowledge did Sony ever raise any concerns or
6 complaints about the quality of either of those games?

7 **A.** My recollection is that the comments we got for them were
8 positive and, like, they were excited about the features we
9 were supporting, the quality of the game. They were positive
10 about it.

11 **Q.** In your experience in the industry, which is fairly
12 lengthy, does past success guarantee future success in the
13 video game industry?

14 **A.** No.

15 **Q.** Can you give us any recent examples -- I think you might
16 have mentioned one earlier -- about a ZeniMax game that didn't
17 perform quite as well as hoped?

18 **A.** You know, a game like Redfall made by a studio Arcane that
19 is amongst our highest rated studios in terms of how their
20 games have been rated when they've released. They're known for
21 making really great quality stuff. And in the case of Redfall
22 they wanted to try something different that was -- didn't look
23 like -- they were trying to evolve and make something that
24 didn't look like other games that they had made, and it -- it
25 wasn't as polished or as good as other things they had made in

1 the past.

2 **THE COURT:** Was it released exclusively to a --

3 **THE WITNESS:** It was -- sorry. It was PC and Xbox
4 exclusive when we launched it.

5 **BY MS. HILL:**

6 **Q.** Is Redfall a similar title to Call of Duty?

7 **A.** No. No.

8 **Q.** And in what ways are they different? Let me count the
9 ways?

10 **A.** All of them. Like, Call of Duty -- and, again, I -- I've
11 been in this industry a long of time. I am not a Call of Duty
12 expert. It is not a game I play religiously, but they put out
13 a new game in that franchise every year. Like, I don't know
14 what the actual team size is, but I'm pretty sure there are
15 more people working on that game than I have across all of our
16 studios in our company.

17 So the scale at which they operate, the kind of game they
18 make, they focus heavily on multiplayer. We don't really have
19 anything that focuses so heavily on, like, an online,
20 boots-on-the-ground multiplayer shooter.

21 Redfall is just a completely different game. I don't
22 think we have anything that really looks like what Call of Duty
23 offers.

24 **Q.** Counsel asked you about Redfall being multiplayer. How
25 many people does Redfall allow to play together?

1 **A.** Right. Again, you know, as we think about it, we don't
2 think about Redfall as multiplayer because to our audience,
3 "multiplayer" means I get to play against another human being,
4 I get to defeat another person.

5 Our game is co-op, meaning all of you are playing against
6 the game. You're playing against AI. There's no humans on the
7 other side doing anything. That's a dramatically different
8 experience than multiplayer where there are other people making
9 choices over there; right? You're not relying on artificial
10 intelligence for the challenge. You're relying on the skill of
11 players. That's just a wholly different experience.

12 **Q.** Is that what you meant by the term "cooperative" when you
13 said Redfall is a cooperative game?

14 **A.** Correct. Meaning all of you are on one side of the
15 playing field.

16 **Q.** How many humans can cooperate together?

17 **A.** You can play the game by yourself or with up to three
18 friends. So, for example, since release, I've pretty much only
19 ever played Redfall by myself. Even though I can play with
20 other folks, I've played it solo. So you can play it by
21 yourself. You can have friends join you if you want.

22 **Q.** Safe to say that you can play Call of Duty with many more
23 than four people?

24 **A.** It is safe to say that.

25 **Q.** How about Starfield? Is that game similar to Call of

HINES - CROSS / HILL

1 Duty?

2 **A.** No.

3 **Q.** And in what ways is Starfield different?

4 **A.** Starfield is a single-player game. Everything in that
5 game is entirely about you and the choices that you make. It
6 is -- it is freedom on a galactic scale. It does systems and
7 things that Call of Duty doesn't. It's -- they're just wildly
8 different.

9 **MS. HILL:** Unless the Court has any further questions,
10 I believe I can pass the witness.

11 **THE COURT:** Can I ask you, other than Deathloop and --
12 well, it was Deathloop --

13 **THE WITNESS:** Ghostwire.

14 **THE COURT:** -- and Ghostwire, when you've been at
15 Bethesda since 1999, were there other games that they were
16 exclusive to one platform?

17 **THE WITNESS:** So we've done lots of exclusivity deals
18 over the years, Your Honor. Sometimes it's as simple as, you
19 know, it's almost like a co-marketing thing where there's no
20 actual difference in -- in what we're doing.

21 Sometimes it can be like we did a thing with Sony for
22 Skyrim on their virtual reality headset to do like a
23 purpose-built version of a game that we had made just for their
24 VR headset, which goes back to my point about, like, developing
25 specifically for the hardware.

HINES - REDIRECT / FLEURY

1 So we have done any number of things like that over the
2 years. And then usually, Your Honor, they're -- when we do
3 things, they tend to be -- or, sorry -- when we have done
4 things, they tend to be timed, which is sort of how we think
5 about Deathloop and Ghostwire, which is there's a period of
6 time for which you talk about that game as if it's an exclusive
7 but then we can, in fact, bring it to another platform as we
8 did with those games bringing it to Xbox.

9 **THE COURT:** So is Starfield a timed exclusive?

10 **THE WITNESS:** Right now it's just an exclusive on PC
11 and Xbox.

12 **THE COURT:** And Redfall?

13 **THE WITNESS:** Same.

14 **THE COURT:** Thank you.

15 **MS. HILL:** Thank you.

16 **THE COURT:** Anything further?

17 **REDIRECT EXAMINATION**

18 **BY MS. FLEURY:**

19 **Q.** Mr. Hines, the types of exclusivity provisions you were
20 just talking about -- co-marketing agreements, timed
21 exclusivity -- prior to the acquisition of ZeniMax by
22 Microsoft, platforms would compete to get those kinds of
23 exclusivity arrangements with ZeniMax; correct?

24 **A.** Insomuch as it was something we were interested in for
25 that title; but, yes, we would take games and decide, hey, we

HINES - REDIRECT / FLEURY

1 want to go see if somebody would like to work with us on an
2 exclusivity for this game.

3 Q. You also mentioned the difficulty of developing a game for
4 more than one platform. That would also apply to the
5 Nintendo Switch; correct?

6 A. Yes.

7 Q. Importing a game to Nintendo Switch could take away focus
8 from developing games for Xbox and Sony; correct?

9 A. That's not exactly how that works but in theory, sure, I
10 can see your point.

11 Q. I'd like to clarify one thing that you said just a moment
12 ago about who makes the decisions on exclusivity.

13 Microsoft owns ZeniMax; correct?

14 A. Yes.

15 Q. I'd like you to turn your attention to PX4391. I'm
16 showing you an e-mail exchange between you and Mr. Spencer on
17 February 10th, 2022.

18 A. (Witness examines document.)

19 Q. And this was around the same timeframe as the e-mail we
20 looked at earlier, the draft e-mail that was to the ZeniMax
21 executives; correct?

22 A. The one that you asked me about that I sent to Jamie and
23 Todd and Todd?

24 Q. Correct.

25 A. I'd need to look at those dates. I thought that was dated

HINES - REDIRECT / FLEURY

1 in '22, not '21.

2 **Q.** I'm sorry. This document is February 10th, 2022. Sorry
3 if I misspoke.

4 And this document references the Xbox blog post also;
5 correct?

6 **A.** Sorry. I'm just making sure I'm on the right one. You
7 said 4391?

8 **Q.** I apologize. I meant PX1754.

9 **A.** Ah, that would explain it.

10 (Laughter)

11 **A.** (Witness examines document.) Yes. Okay.

12 **MS. FLEURY:** I apologize, Your Honor. We are on
13 PX1754.

14 **THE COURT:** Right.

15 **BY MS. FLEURY:**

16 **Q.** So this, I did accurately describe it.

17 **A.** Yes. This is --

18 **Q.** Now we're on an e-mail exchange between you and
19 Mr. Spencer dated February 10th, 2022.

20 **A.** Yes.

21 **Q.** Now can I ask you: This is around the same timeframe and
22 on the same subject matter as the e-mail you sent to the
23 ZeniMax executives?

24 **A.** That we spoke earlier, yes.

25 **Q.** And you asked Mr. Spencer directly; correct?

HINES - REDIRECT / FLEURY

1 **A.** I did.

2 **Q.** And his response was "Great topic. Probably best for us
3 to get on a call to discuss"; correct?

4 **A.** Yes.

5 **MS. FLEURY:** Your Honor, I move to admit PX1754 into
6 evidence.

7 **THE COURT:** Admitted.

8 (Trial Exhibit 1754 received in evidence.)

9 **BY MS. FLEURY:**

10 **Q.** I'd like you to turn now to PX4391.

11 **A.** Okay.

12 **Q.** And this is an e-mail exchange between you, Mr. Spencer,
13 Matt Booty, Jerret West, and others at Microsoft; correct?

14 **A.** Correct.

15 **Q.** And it's dated January 7th, 2021; correct?

16 **A.** Yes.

17 **Q.** The subject line is "Project Relic Announced." Do you see
18 that?

19 **A.** I do.

20 **Q.** And Project Relic was the Indiana Jones game we discussed
21 earlier?

22 **A.** Yes.

23 **Q.** If you turn to the second page of this document.

24 **A.** Okay.

25 **Q.** The third paragraph down the second sentence in that

1 paragraph, it says (as read):

2 "While it is not in our messaging, I think it's
3 important to highlight that Lucasfilm brought up to me the
4 issue of platforms because we have a signed agreement with
5 them to make the game for PC and multiple consoles."

6 Do you see that?

7 **A.** I do.

8 **Q.** You say a couple sentences down (as read):

9 "I do understand their concern and want to highlight
10 that. In their interviews they may say something about
11 multiple consoles."

12 Correct?

13 **A.** Yes.

14 **Q.** And you address this question about what to do about these
15 questions from Disney to Microsoft executives; correct?

16 **A.** I do.

17 **Q.** And in response Phil Spencer says, and this is now on the
18 first page of PX4391 in the third paragraph (as read):

19 "The upside here is a game coming from Bethesda that
20 everyone will be excited about. This is the most
21 important thing. The downside will be for Xbox a feeling
22 that with Deathloop, Ghostwire, and now an assumption on
23 Project Relic that a large percentage of the output from
24 Bethesda won't directly benefit the Xbox console community
25 in any way."

HINES - REDIRECT / FLEURY

1 Do you see that?

2 **A.** I do.

3 **Q.** As we discussed earlier, the contract for Indiana Jones
4 was later changed to make it exclusive to Xbox and PC; correct?

5 **A.** Correct.

6 **Q.** Just one more document, Mr. Hines.

7 **THE COURT:** We're admitting that one 43 --

8 **MS. FLEURY:** Thank you, Your Honor.

9 **THE COURT:** Technically we should probably admit them
10 before we show them just in case there's -- I know the parties
11 have come to an agreement, but just in case there's some
12 unforeseen objection. Before it's shown and before the
13 substance is discussed, just move to admit.

14 **MS. FLEURY:** Happy to, Your Honor.

15 (Trial Exhibit 4391 received in evidence.)

16 **BY MS. FLEURY:**

17 **Q.** Let's take a look at a document in your binder PX4408.

18 **A.** Okay.

19 **Q.** This is a chat description -- sorry.

20 This is a chat between you and Jamie Leder; correct?

21 **A.** Correct.

22 **Q.** And Jamie Leder again was the CEO of ZeniMax?

23 **A.** Correct.

24 **Q.** This is dated February 10th, 2022?

25 **A.** Right.

HINES - RECROSS / HILL

1 **MS. FLEURY:** Your Honor, I move to admit PX4408.

2 **THE COURT:** Admitted.

3 (Trial Exhibit 4408 received in evidence.)

4 **BY MS. FLEURY:**

5 **Q.** And in this chat conversation between you and Mr. Leder
6 you asked Mr. Leder about the same topic that we saw on the
7 other e-mails, the blog post, and the announcement about
8 Activision exclusivity; correct?

9 **A.** Correct.

10 **Q.** And Mr. Leder tells you "Feel free to reach out to get
11 clarity"; correct?

12 **A.** Yes.

13 **MS. FLEURY:** I pass the witness.

14 **THE COURT:** Ms. Hill?

15 **RECROSS-EXAMINATION**

16 **BY MS. HILL:**

17 **Q.** Mr. Hines, you were just asked about some documents that
18 showed that you intended to reach out to Phil Spencer to ask
19 about a blog post that he had written?

20 **A.** Right.

21 **Q.** Did you end up having that call with Mr. Spencer?

22 **A.** I did.

23 **Q.** And after that conversation with Mr. Spencer, what was
24 your understanding of the approach that you and your team
25 should be taking with respect to exclusivity of ZeniMax titles?

HINES - RECROSS / HILL

1 **A.** That we were going to continue the approach that we
2 already had, which was look at these on a title-by-title basis
3 and decide what was -- what was best for those games, what was
4 best for us.

5 **MS. HILL:** No further questions.

6 **THE COURT:** So why was Indiana Jones then amended;
7 right? I mean, when you looked at it the first time, you took
8 that approach --

9 **THE WITNESS:** Uh-huh.

10 **THE COURT:** -- right, the case-by-case approach and
11 came up with an agreement that it was not going to be
12 exclusive, I take it?

13 **THE WITNESS:** Yes.

14 **THE COURT:** So why the change?

15 **THE WITNESS:** There's a couple of different reasons
16 but, honestly, the primary one, in my view, is just, in my
17 view, is what I said before about reducing risk and trying to
18 get to a degree of certainty.

19 You're dealing -- you're dealing with a licensor who is
20 going to be very -- who's going to have a ton of feedback on
21 what you're making that is going to add a lot of time to your
22 schedule.

23 These agreements when you do these things have -- you
24 don't get to take as long as you want. You're -- you're
25 required to put down a window of time in which you're going to

HINES - RECROSS / HILL

1 release the game, which means, like, you immediately have a
2 clock that's ticking on you; right?

3 For Starfield I'm not licensing this. I can decide when
4 it's best to put that out based on what we think. You know, if
5 you have a contract that says "by this date," like, you're
6 working with a different set of circumstances.

7 So we were looking for how do we reduce risk and try and
8 get this on a path where we know that this will be a big
9 success. And, truthfully, we also kind of liked the idea of
10 embracing bringing it to Game Pass and how many players that we
11 could -- we could get there.

12 **THE COURT:** Okay. Because when you originally
13 negotiated the contract, all those same considerations were
14 there.

15 **THE WITNESS:** Well, sorry, Your Honor. In that -- in
16 those moments, we are a small independent publisher; right? We
17 are -- we are not somebody who can afford misses or failures;
18 right? We just -- being independent and fighting publishers
19 that are multiple times larger than you, we can't afford to
20 miss. So we try and make sure we're stacking the deck in our
21 favor given the situation that we're in when we sign the deal
22 originally as a small independent publisher, which is very
23 different than being part of Xbox and Microsoft now.

24 **THE COURT:** In other words, Disney would have wanted
25 it to be on as broad as possible and so you felt like you sort

BOND - DIRECT / WILKINSON

1 of had to meet that desire at the time?

2 **THE WITNESS:** That. Yes, ma'am.

3 **THE COURT:** Did you have any follow-up?

4 **MS. HILL:** No, Your Honor. Thank you.

5 **THE COURT:** Anything further from the FTC?

6 **MS. FLEURY:** No, Your Honor.

7 **THE COURT:** All right, Mr. Hines, you are excused.

8 **THE WITNESS:** Thank you, ma'am, Your Honor.

9 **THE COURT:** Okay. I think we're now taking a witness
10 out of order.

11 **MS. WILKINSON:** Yes, Your Honor.

12 **THE COURT:** All right. Would the Defendants like to
13 call the next witness?

14 **MS. WILKINSON:** We call Sarah Bond, please.

15 **THE CLERK:** Please raise your right hand.

16 **SARAH BOND,**
17 called as a witness for the Defendants, having been duly sworn,
18 testified as follows:

19 **THE CLERK:** Can you please state your name for the
20 record?

21 **THE WITNESS:** My name is Sarah Bond.

22 **THE CLERK:** Thank you.

23 **THE COURT:** You may be seated.

24 **THE WITNESS:** Thank you.

25 \\\

BOND - DIRECT / WILKINSON**DIRECT EXAMINATION**

BY MS. WILKINSON:

Q. Good morning, Ms. Bond.

A. Good morning.

MS. WILKINSON: Your Honor, can I ask for a moment what you'd like the schedule to be, when you'd like to take the lunch break so I can just time? We're doing very well on timing.

THE COURT: Yeah. We usually take it around noon.

MS. WILKINSON: Thank you.

BY MS. WILKINSON:

Q. Ms. Bond, tell Her Honor your current title.

A. My title is corporate vice president Xbox creator experience and ecosystem.

Q. Tell her what that means.

A. My team is responsible for all of the things related to partnering with Xbox and bringing games to Xbox. So that includes all of our developer tools, all of our publishing services, and all of our commercial partnerships and agreements.

THE COURT: When you say "Xbox," do you mean just the console or you mean Xbox including Game Pass? Are you including PC?

THE WITNESS: Yes.

THE COURT: Okay.

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1 **THE WITNESS:** Whenever I say "Xbox," I do mean the
2 whole thing.

3 **THE COURT:** Xbox the division?

4 **THE WITNESS:** Yes.

5 **BY MS. WILKINSON:**

6 **Q.** Is -- a part of your responsibility is to bring in third
7 parties to put their games on your various platforms?

8 **A.** Yes, it is.

9 **Q.** When did you start in that role?

10 **A.** I began in that role approximately three years ago.

11 **Q.** Was that your first job at Xbox?

12 **A.** No.

13 **Q.** What was your first job at Xbox?

14 **A.** Prior to that, I was -- I ran business development. So
15 only the commercial and partnership functions.

16 **Q.** All right. Let's just give a brief description of your
17 background. Where did you graduate from college?

18 **A.** Yale University.

19 **Q.** Did you go to business school?

20 **A.** Yes, I did.

21 **Q.** Where?

22 **A.** Harvard Business School.

23 **Q.** Okay. And what job did you take after you left Harvard
24 Business School?

25 **A.** I worked at McKinsey Consulting.

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1 Q. Did there come a time that you worked at a company called
2 T-Mobile?

3 A. Yes, there was.

4 Q. What did you do for them?

5 A. I was the chief of staff for the CEO. Then I led strategy
6 and then I led strategy business development and new business
7 ventures.

8 Q. When did you come to Microsoft?

9 A. 2017.

10 Q. Since you've been at Microsoft, have you looked at,
11 studied, and participated in the evolution of the gaming
12 industry?

13 A. Yes, I have.

14 Q. Okay. That sounds fancy, but can you just give us briefly
15 how you've seen the industry change over time?

16 A. Yeah. Well, in some ways the gaming industry started with
17 arcades 40 years ago. Then there were the first consoles like
18 Atari. Then also PC games. And then with the advent of the
19 smartphone, mobile games became very popular.

20 Q. And in that giant marketplace of folks, how many people do
21 you think are out there that you're looking to bring into the
22 gaming world?

23 A. There are about 3 billion people globally who play games
24 today. The vast majority of them are playing on smartphones.
25 So mobile is over 50 percent of the industry, PC is the next

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1 largest, and console is the smallest and slowest growing.

2 **Q.** Okay. So tell us your strategy at Xbox for reaching those
3 consumers?

4 **A.** Well, for us, we want to have Xbox give all 3 billion
5 gamers a positive gaming experience, that they can come to Xbox
6 and find what they need. And so that strategy is grounded in
7 us having a very wide and depth and breadth of content and
8 providing ubiquity of access to those games.

9 **Q.** Do you think it's feasible at all if you just put your
10 games on the console that you could reach even, you know, a
11 small percentage of those 3 billion people?

12 **A.** It is in no way feasible.

13 **Q.** Why?

14 **A.** The console is a flagship experience, but it requires
15 people to make a large upfront purchase. Most people today
16 actually just want to play games on the device they already
17 have. Most people are playing on mobile, and it's very clear
18 consumers have told us they want us to meet them where they
19 are, not require them to go do something, you know, that isn't
20 necessarily natural for them to go find a game.

21 **Q.** Approximately how much is an Xbox today?

22 **A.** \$500.

23 **Q.** And if you buy a game online, how much does that game
24 normally cost?

25 **A.** \$70.

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1 Q. How much success to date, if you look at all the other
2 consoles, has Xbox had in the marketplace?

3 A. Xbox is the third largest console player, the smallest;
4 and console is also the smallest part of the industry.

5 Q. And what other consoles are your competitors?

6 A. PlayStation and Nintendo Switch.

7 Q. We've heard just a little bit about Nintendo Switch and
8 some suggestion that it only has games for youth and younger
9 folks; is that true?

10 A. No, that is not true.

11 Q. Are you aware of other games that are on Xbox that are
12 also on Switch?

13 A. Yes.

14 Q. And are some of those games aimed at more, as you say, a
15 broader consumer base than just youth?

16 A. Yeah. Like Diablo.

17 Q. Tell Her Honor what Diablo is, what kind of game it is.

18 THE COURT: Yeah, I don't know.

19 THE WITNESS: Oh.

20 THE COURT: Not into it.

21 THE WITNESS: It's literally my father's favorite
22 game.

23 The Diablo franchise is built on this idea that you battle
24 an unstoppable evil, which is the devil effectively, and you
25 battle through hell as numerous, perhaps, characters, like a

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1 necromancer.

2 **BY MS. WILKINSON:**

3 **Q.** Aimed at a certain audience, shall we say; right?

4 **A.** Yes, including my 76-year-old father.

5 **Q.** Okay. Let's talk about the success in the other ways or
6 the other platforms that you deliver your games.

7 So you said there's a, relatively speaking, small console
8 market; right?

9 **A.** Uh-huh.

10 **Q.** And how is Xbox doing in the PC market?

11 **A.** Xbox has a small proportion of the PC market. We do have
12 PC Game Pass and we do place our games on PC, but we're small.

13 **Q.** And I said "market." I mean, do you consider PC and these
14 consoles competing with each other? In other words, your games
15 can be put on all of them?

16 **A.** Yes. We -- it's a device as part of the people choose to
17 play on.

18 **Q.** Okay. Explain what a PC is and how it is -- provides a
19 different experience than a console.

20 **A.** Well, a console is -- it's a specialty device really
21 designed to play games versus a PC is a multipurpose device
22 that you can do any number of things on, productivity things,
23 but you could also play games.

24 **Q.** Is there any difference in experience in terms of speed or
25 power between a PC and an Xbox or a PlayStation console?

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1 A. Yes, there can be. A PC can have a wide range of specs
2 versus the console specs, we really have two console specs that
3 you have here the series S and the series X.

4 Q. And are you trying to expand Xbox's presence on PCs?

5 A. Yes, we are.

6 Q. Why?

7 A. Because we recognize that console is the smallest and
8 slowest growing part of the market and we see an opportunity to
9 grow our business by being on PC and mobile.

10 Q. Let's talk about mobile. What is the Xbox's current
11 presence on mobile?

12 A. *De minimis*.

13 Q. Can you explain how mobile works? We heard about, just
14 very briefly, from the FTC what -- the duopoly. Can you
15 explain how people access mobile games on their phone?

16 A. Yes. Mobile is effectively a duopoly, Google and Apple.
17 What customers do is they go to the app store on their
18 phone, and they download the game to play it on their mobile
19 device.

20 Q. And is there a difference between playing on their device
21 itself and streaming the game onto a device?

22 A. Yes, there's a difference.

23 Q. Can you explain that?

24 A. When you're streaming a game to a device, what's happening
25 is all of the computations associated with the game are

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1 happening in a remote location. And so if you -- say you want
2 to change something that you're doing, you push a button. It
3 has to go all the way to the remote location, a computation
4 happens, and then it's sent back. So there is latency, which
5 is essentially governed by the speed of light.

6 **Q.** So are games built to be played on mobile itself natively
7 or are all games streamed onto mobile?

8 **A.** Almost every single game that is being played on a mobile
9 device today is being built to be played natively on that
10 device where the computations happen on the mobile device.

11 **Q.** Do gamers -- actually, would gamers rather be playing a
12 native game on mobile than streaming it?

13 **A.** Based off of our experiences, yes, absolutely.

14 **Q.** Why do you understand that's a better experience?

15 **A.** Well, the first is it's easier to discover. So today we
16 don't actually have the capability of putting a game that's
17 streamed in the app store so gamers can't even find it.

18 **Q.** "You" meaning Xbox is not able to do that?

19 **A.** Yes.

20 **Q.** Okay.

21 **A.** Or any streaming company.

22 **THE COURT:** That's because the app store just doesn't
23 have streaming apps?

24 **THE WITNESS:** They don't allow them for games --

25 **THE COURT:** They don't allow them.

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1 **THE WITNESS:** -- in the way that...

2 **BY MS. WILKINSON:**

3 **Q.** Do they allow Netflix streaming apps and movies?

4 **A.** They do. They do.

5 **THE COURT:** Just not for games?

6 **THE WITNESS:** Just not games.

7 **BY MS. WILKINSON:**

8 **Q.** Do they allow their own games in their apps?

9 **A.** They do allow their own games in the app, but they are
10 native games.

11 **Q.** So assume the gamer can find your game and download it on
12 mobile, that experience is better than streaming it onto the
13 phone because?

14 **A.** It's better because there is no latency in that example;
15 but also if a game is built natively for mobile, like actually
16 designed to be played on that device, it's a better experience
17 for any number of reasons: The way the text font is, the way
18 the buttons are.

19 **Q.** Just like something is different for a big --

20 **A.** Yeah.

21 **Q.** -- laptop versus a small Surface iPad or something like
22 that?

23 **A.** Exactly.

24 **Q.** Okay. Let's talk a little bit about how people -- well,
25 let's go back to mobile because we were talking about that.

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1 Just explain what Xbox's presence is in mobile today.

2 **A.** Today our presence is very small. Really it's just
3 Minecraft mobile, and we have a service called xCloud or Xbox
4 cloud gaming that streams console games to mobile devices.

5 **Q.** And before we discuss how you actually access games and
6 pick those different ways to play games, can you describe
7 generally the difference between a single-player game and a
8 multiplayer game? And then we'll talk about cross platforms.
9 So start with what it means to play a single-player game.

10 **A.** When you play a single-player game, normally the game is a
11 story and it's just you and you play through the game, and any
12 characters or things that you encounter in the game are not
13 actually being played by other people. It's just the
14 computations of the game.

15 When you play a multiplayer game, what actually happens
16 is -- is you are matched with other people of a similar skill
17 level as you, and so the things you encounter in the game are
18 actually other people playing simultaneous from their own
19 location.

20 **Q.** Okay. Let's keep with Xbox.

21 If I'm on the console and I'm playing this game and I'm
22 playing in a multiplayer game playing against you, I'm playing
23 my game natively on my console; right?

24 **A.** Yeah.

25 **Q.** And you're playing it natively on your console?

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1 A. Yes.

2 Q. And how does my console -- or how do I know and how does
3 my console communicate with you about your move so that I'm
4 playing against you and not against the game?

5 A. We have a service called Xbox Live that does all of that
6 work.

7 Q. Okay. And now what is a cross-platform game?

8 A. So cross platform is let's say you are playing on your
9 PlayStation and I am playing on my Xbox, we're playing a
10 multiplayer game but we can still be playing against each other
11 or with each other.

12 Q. And if Her Honor is on Nintendo, if that game is on all
13 platforms, we can all play against each other?

14 A. Yes. Like with Minecraft, yeah.

15 Q. Now, do you provide that service to Xbox gamers -- all
16 those services to Xbox gamers?

17 A. Yes.

18 Q. Let's take a look if we could at 5044. It's your tab 10.

19 A. I'm sorry. The number again?

20 Q. 5044.

21 A. (Witness examines document.)

22 Q. Is this a screenshot from an Xbox, you know --

23 A. Yes.

24 Q. -- screen on your device? Yes?

25 A. Yes.

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1 **MS. WILKINSON:** Your Honor, we would move in RX5044.

2 **THE COURT:** Admitted.

3 (Trial Exhibit 5044 received in evidence.)

4 **MS. WILKINSON:** And if we could display it, please.

5 **BY MS. WILKINSON:**

6 **Q.** Okay. Let's walk through briefly, if we could, what we
7 do.

8 I decide to buy an Xbox for my child.

9 **A.** Uh-huh.

10 **Q.** And what does the first thing my kid have to do to even
11 play a game on Xbox?

12 **A.** So the first thing you have to do is you have to register.

13 **Q.** Okay.

14 **A.** Create an account.

15 **Q.** So you know who I am or who the player is with some
16 identification?

17 **A.** Yes.

18 **Q.** And then if I want to play a multiplayer game, so I don't
19 want to just play by myself but I want to play against you, do
20 I have to pick one of these services listed here below?

21 **A.** Yeah. If you just want to play a multiplayer game, you
22 would purchase Xbox Live Gold for a monthly amount.

23 **Q.** So that's a subscription?

24 **A.** It is.

25 **Q.** Okay.

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1 **A.** And we run the service that we were speaking about earlier
2 in exchange for the subscription.

3 **Q.** If I just had a first-person game and I just wanted to
4 play with myself and I owned the game already, it was on -- you
5 know, I purchased it and I wanted to play it, do I need to pay
6 the 9.99 for Xbox Live Gold if I'm only playing against the
7 game?

8 **A.** No.

9 **Q.** I can use my Xbox that way without paying a monthly
10 subscription fee?

11 **A.** That's correct.

12 **Q.** And is it your understanding that Sony and the PlayStation
13 has a variance of this but similar service offerings?

14 **A.** Yes.

15 **Q.** Okay. So if I've paid for Xbox Live Gold, can I play
16 cross platform? Like if my friend is on PlayStation and I only
17 have Xbox Live Gold, can I play against them if the game
18 provides it?

19 **A.** Yes.

20 **Q.** Okay. Now, if I want to go and receive Game Pass, do I
21 have to subscribe at a different level?

22 **A.** Yes.

23 **Q.** Okay. Tell us what Game Pass is.

24 **A.** So Game Pass is a subscription. It gives you access to a
25 portfolio of games and you pay a monthly amount in exchange for

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1 that access.

2 Q. Okay. So if I'm a gamer and I have a game I love and I
3 want to purchase it, how do I purchase it from Xbox so I can
4 play it on my Xbox?

5 A. So when you go into the Xbox, there's a tab called "Store"
6 and you click in there, you can search for the game and
7 purchase it. Alternatively, if you had Game Pass, you could
8 just play the game in Game Pass. So people can choose.
9 There's sort of substitutes depending on what you prefer.

10 Q. So when you guy buy the game, it's software that you're
11 downloading onto your Xbox?

12 A. Yes.

13 Q. In the old days people like us used to go to Best Buy and
14 buy the disk; right? It's the same thing? You laugh
15 because --

16 A. Yeah, you can actually still buy disks today, but most --

17 Q. Most regular people don't do that, do they?

18 A. Yeah.

19 Q. Or most gamers don't do that anymore, do they?

20 A. No.

21 Q. All right. So I have my game I want to play and I can buy
22 it for that, but if I go to Game Pass, do I own any of those
23 games?

24 A. As long as the game is in the subscription and you are
25 subscribed, you can play the games, yes.

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1 **Q.** So I don't have to pay the \$70 for the game that I want to
2 play if it's in Game Pass?

3 **A.** That's right.

4 **Q.** And what kind of games do you carry in Game Pass?

5 **A.** We have a really broad portfolio of games in Game Pass.
6 We look to, you know, bring games that -- all of our
7 first-party studio games are in there, but then we also have
8 games that you otherwise may not have discovered or really
9 unique in there.

10 It's a really, really broad range because there's so many
11 different play styles and things that people actually enjoy and
12 love.

13 **Q.** Can you give us an example of a few different kinds of
14 games that aren't, you know, the ones we've been at least
15 hearing most about here?

16 **A.** Okay. There's a beautiful one that just launched called
17 Planet of Lana. You play this character.

18 One of my favorite is a physics puzzle game called
19 Human:Fall Flat. You have to navigate your character, but it's
20 got real-world physics in it.

21 And then there are games from our first-party studios.
22 Hi-Fi Rush would be a good example.

23 **Q.** Are there puzzle-type games?

24 **A.** Yeah. There's puzzle games, sports games, action games,
25 adventure games. We aim to have the whole breadth and depth of

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1 both, like, play style but kind of mood and moment, age.

2 We've also worked really hard to span geographically, like
3 different cultures, different languages, to make sure that --
4 you know, because we're trying to make sure that we're creating
5 something that's really broad appeal, that anyone who goes in
6 there will find a set of games that they really love and they
7 want to play.

8 **Q.** How long do games remain in Game Pass?

9 **A.** It's a range. The games from our own game studios are
10 always in Game Pass. The others range from months to years
11 depending on the agreement we come to with the publisher.

12 **Q.** Are there times when people play a game in Game Pass and
13 they like it so much they go buy a copy of it?

14 **A.** Yes. Yeah.

15 **Q.** So sometimes when developers -- or when you're trying to
16 persuade your third-party developers to put their games into
17 Game Pass, are they concerned about the idea that people can
18 switch and go buy their game there or, you know, use it in
19 Game Pass?

20 **A.** Well, when we first started the program, it was new. This
21 was in 2017. And that was a concern expressed by publishers,
22 and we do enter into a licensing agreement to make sure that
23 overall that it's beneficial for both sides.

24 But what we found once we launched it is that it actually
25 also generated a lot of discovery of games. So people are --

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1 nine out of ten people say they play a game they otherwise
2 wouldn't have played.

3 As you said, people are very likely to actually go buy the
4 game so they can permanently have it in their library if they
5 play it.

6 And it will also tend to, you know, introduce them to new
7 types of games. So, like, for example, with the game
8 Human:Fall Flat, 60 percent of people who played it had never
9 played a puzzle game before when it was in Game Pass and
10 40 percent of that 60 percent actually went on and bought
11 another puzzle game outside of Game Pass once they figured out
12 that they loved puzzle games.

13 **THE COURT:** So when you say it's the third-party games
14 that they go out and purchase because those might be removed;
15 right? They're on Game Pass for a limited period of time?

16 **THE WITNESS:** Uh-huh.

17 **THE COURT:** But Xbox first-party games, you said
18 they're always on Game Pass. So why would anyone go buy a \$70?
19 They wouldn't; right? Because they can always play it through
20 Game Pass?

21 **THE WITNESS:** You're probably right. I haven't
22 actually pulled that data cut, yeah.

23 **BY MS. WILKINSON:**

24 **Q.** Do sometimes gamers find on the third-party games that
25 they like that game so much they go purchase it to keep it in

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1 their library?

2 A. Yes, they do.

3 Q. And do you believe having all this choice for gamers is
4 good for them?

5 A. I do, yes.

6 Q. Is it also good for business at Xbox?

7 A. Yes. It's -- we've gotten very clear feedback that
8 players love it. They love the opportunity to discover games.
9 It gives them access to games they may have otherwise not have
10 been able to or would have thought to have purchased.

11 And then we've also gotten consistent feedback that
12 developers love it because it helps them be discovered. And
13 many of them also tell me that they are more comfortable taking
14 new and creative risks because they know they're going to be
15 able to find an audience in Game Pass, and that's much easier
16 than being discovered in a very broad store.

17 Q. Based on that success, have you been able to convince more
18 developers to put games into Game Pass?

19 A. Yes. And we have, like, the super majority of developers
20 who came into Game Pass this last year put a game in actually
21 had done so before so they more want to come and people like
22 coming back and using it again.

23 Q. Is it important to replenish the supply or add more games
24 to Game Pass?

25 A. Yes, it is.

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1 Q. Why?

2 A. Well, one, the existing subscribers will play the games
3 and then they want other new ones to play.

4 The second is we continue to want to expand the relevance
5 of Game Pass to more gamers. We actually added 40 -- more than
6 40 new geographies this last year so there's a geographic
7 preference, but also just player style and type of game is
8 really broad when you think about trying to have relevance to
9 3 billion gamers.

10 Q. Let's finish up here so you can explain the last
11 subscription service available.

12 And that says Xbox Game Pass Ultimate. What does one get
13 for that monthly subscription?

14 A. Okay. So on the chart there is Game Pass for console,
15 console games.

16 Q. Why don't you tell her about those before you move on.

17 A. Yeah. It's inclusive of the answer. That's why I was
18 going to go do that.

19 So that's the portfolio for the console games. And then
20 PC Game Pass is a portfolio games but they're PC games. And
21 then what Ultimate is is it's the combination of all three: PC
22 Game Pass, console Game Pass, and Xbox Live Gold.

23 **THE COURT:** Can the PC be played on any PC or does it
24 have to be a PC with at least maybe for certain games with
25 certain abilities or specifications?

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1 **THE WITNESS:** Every game does have certain specs. So
2 there's some games that cannot be played on low-powered PCs.

3 **BY MS. WILKINSON:**

4 **Q.** What else do you get with Xbox Game Pass Ultimate?

5 **A.** Um, the other part that's in ultimate is you have the
6 ability to play your games natively from the cloud so play the
7 games streamed. Xbox Cloud Gaming or xCloud is included in
8 here as well.

9 **Q.** And what games currently can you stream if you are a
10 member of this subscription from your Xbox or to some other
11 device that you want to play on?

12 **A.** You can stream games in Game Pass where the publisher or
13 the developer of that game has given us the right to do so.

14 **Q.** Can you stream games you own, you know, in your separate
15 library versus in Game Pass?

16 **A.** No. The game does have to be in Game Pass in order for
17 you to use Xbox Cloud Gaming.

18 **Q.** And you can't stream all the games in Game Pass?

19 **A.** No.

20 **Q.** And have you tested kind of the appeal of cloud streaming
21 to your gamers?

22 **A.** Yes, we have.

23 **Q.** How have you done that?

24 **A.** Well, when we offered it as part of Game Pass Ultimate, we
25 offered it to our gamers and we were able to understand how

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1 much -- how attractive it was to them.

2 **Q.** And relative to the other features you have in your
3 subscriptions, is it popular?

4 **A.** No.

5 **Q.** Why?

6 **A.** Well, I think some of it is due to, as we talked about
7 earlier, the latency. The other is due to the fact that the
8 games that are being streamed are games built for the console
9 but they're being streamed, again, to a different device. So
10 sometimes it's just not -- most often that's not the best
11 player experience.

12 And so what we found is that it's really being used by our
13 players more as a feature for the console. Because what people
14 can do is when you go in to start playing a new game, instead
15 of waiting to download it, you can start playing it right away
16 while you're streaming through streaming, but -- while it's
17 downloading in the background. And that is the vast actually
18 majority of the usage of Xbox Cloud Gaming today, is it's just
19 a console feature.

20 **THE COURT:** How long does it normally take to download
21 say a AAA game?

22 **THE WITNESS:** It totally depends on the -- your
23 connectivity and the size of the game, but it could be
24 two hours --

25 **THE COURT:** Oh, that's long.

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1 **THE WITNESS:** -- for a biggie, yeah.

2 **BY MS. WILKINSON:**

3 **Q.** So that's where you're seeing people use it during that
4 two hours when they're eager to play and they don't often stay
5 on or use it via streaming once the game is downloaded?

6 **A.** Yeah. Once the game is downloaded, then you've got that
7 native optimal experience and you move ahead.

8 **Q.** We're going to hear testimony from Mr. Ryan's deposition
9 tomorrow, but do you agree that xCloud or streaming games is
10 not a separate market, you know, not a separate game other than
11 a delivery mechanism for games?

12 **A.** Yeah. It's --

13 **MS. FLEURY:** Objection. Calls for a legal conclusion.

14 **THE COURT:** I'm going to interpret it to not be a
15 legal conclusion.

16 **BY MS. WILKINSON:**

17 **Q.** Of course not. From your business perspective, Ms. Bond?

18 **A.** No, it's a feature. It's a delivery mechanism and most of
19 our usage is exactly that for the console.

20 **Q.** And if we looked here at the Xbox site, there's no way to
21 get streaming as an independent service; right?

22 **A.** No.

23 **Q.** So it is only one of the features of Xbox Ultimate?

24 **A.** Yes.

25 **Q.** Okay. You talked about having a diverse portfolio of

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1 content --

2 A. Uh-huh.

3 Q. -- for your business. Is that true not just with regard
4 to Game Pass but with regard to your first-party games and any
5 other games you have offerings?

6 A. Yes.

7 Q. Why is that so important?

8 A. Because we know that people just have so many different
9 preferences. Like, you can't put anyone into one bucket and
10 even the same person actually can want to do a different thing
11 at a different moment in time, and so having that diversity is
12 critical to being able to meet players' needs.

13 Q. We've heard a little bit about what's been called AAA
14 games. Are you familiar with that term?

15 A. Yes.

16 Q. Is that a term of art in your industry?

17 A. Yeah, people use that term.

18 Q. Do they -- is there a known definition?

19 A. There's no set definition.

20 Q. What does -- what is your understanding of what a AAA game
21 is?

22 A. It tends to imply a game of a certain size and scope, a
23 certain level of investment put into the game.

24 Q. And does that mean a larger investment?

25 A. Yes.

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1 Q. Okay.

2 A. Larger, yeah.

3 Q. And so within your portfolio of games, do you have some of
4 those larger, more complicated games?

5 A. We do.

6 Q. And do you have many others that are also successful that
7 aren't don't qualify as one of those large, well-known
8 franchises or investments?

9 A. Yes.

10 Q. Okay. And why is that? Why can some of those -- why is
11 it that those games can be successful as well as a big AAA
12 game?

13 A. Because not everybody wants the same thing. Not everyone
14 wants the same thing at the same moment. Sometimes you want to
15 do multiplayer. Sometimes you just want to have a beautiful
16 single-player experience. Sometimes it's cool to do a game
17 that you can complete in six hours. Other times people want to
18 get really deep into a game and play it for a hundred hours.

19 Q. Is there any game you can think of that's so essential you
20 have to have it?

21 A. No.

22 Q. And if a game is part of a well-known franchise or has had
23 a big investment, does that mean that it will be successful?

24 A. No.

25 Q. And what have you seen in the past every year about what

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1 game becomes successful? Have you been able to predict which
2 games will be successful?

3 **A.** No. One of the things when I came to this team that
4 really struck me is how every year there's a game that becomes
5 wildly successful and popular that comes from a tiny team.

6 I actually think it's really beautiful. You know, most
7 people forget now, but Fortnite, you know, Epic was a small
8 indy studio and then they had this huge success.

9 Player Unknown Battle Grounds, I mean, we visited that
10 team. They were, like, you know, a one-room dev team and then
11 it became really big among us, wildly popular.

12 This year Vampire Survivors was another one. It won a
13 BAFTA award.

14 So there's no ability to predict these things.

15 **Q.** What is a BAFTA award?

16 **A.** It's like the British Academy Awards for games. I don't
17 know what the acronym is. British Actor Film something.

18 **Q.** Does Xbox have a specific program to try and encourage
19 independent and small developers to actually not just develop
20 their games but bring them to Xbox?

21 **A.** We do. We have a program called ID at Xbox. "ID" stands
22 for independent developer.

23 **Q.** How does it work?

24 **A.** So what -- the way it works is it makes it very easy for a
25 small team to simply self-publish their game on Xbox. They

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1 submit a concept and then we give them a dev kit and resources
2 so that they can develop and ship their game on the platform.

3 **Q.** And are these -- do you invest funds in that program?

4 **A.** We do. We support the developers in that program. And
5 then we also launch something called the Developer Acceleration
6 Program as part of it, which goes a step further for
7 underrepresented creators or teams that are developing games
8 around stories that are underrepresented in the industry and
9 gives them an extra level of support so they can succeed.

10 **Q.** Can you give an example of one of your favorites that came
11 out of that program?

12 **A.** Oh, man. There's one called Soup Pot, which is about
13 making soup. Like, it was made by some women in Malaysia.

14 There's another one that hasn't shipped yet called She
15 Dreams Elsewhere built by a single African American man in the
16 inner city about his struggle with mental health.

17 There's a lot of them, yeah.

18 **Q.** When those games are created, are they often put into
19 Game Pass?

20 **A.** They can be. It's totally based off of it making good
21 sense for both us and the developer.

22 **Q.** Okay. So you don't force those folks to put their games
23 into Game Pass?

24 **A.** No.

25 **THE COURT:** What makes good sense for you to put a

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1 game into Game Pass from Microsoft's point of view?

2 **THE WITNESS:** We sort of look at creating this
3 balanced portfolio; right? So you have some games that are a
4 certain size and scope and play style, and then we'll have
5 others and then we think about the timing; right?

6 And then we estimate what we think the value of it is, and
7 then we have that discussion with the publisher. So it's sort
8 of a -- it's multidimensional. It's like you're constantly
9 sort of curating this catalog, and so one thing will influence
10 another.

11 **THE COURT:** Is there a limit? Like, do you not want
12 the catalog to get too big?

13 **THE WITNESS:** No, there's no limit.

14 **THE COURT:** No limit?

15 **THE WITNESS:** Yeah.

16 **BY MS. WILKINSON:**

17 **Q.** Let's turn to Call of Duty. You're familiar with -- are
18 you familiar with that game?

19 **THE COURT:** It's noon. Do you want to -- do you want
20 to -- I'm fine to keep going or we can stop for lunch now.

21 **MS. WILKINSON:** No, it's a perfect place to stop now.

22 **THE COURT:** Okay. We'll take a 45-minute lunch and so
23 we'll resume at 12:45.

24 You can step down.

25 **THE WITNESS:** Great.

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(Luncheon recess was taken at 12:00 p.m.)

AFTERNOON SESSION**12:47 p.m.**

THE CLERK: Remain seated. Come to order.

THE COURT: Before I forget, I'm going to -- about to file an order that advises the parties that by 4:00 p.m. you're to provide Ms. Means electronic copies of the exhibits admitted today except for those that were admitted in camera and the other ones admitted with redactions so that we can post them to the public available website shortly thereafter.

Okay. We can continue with Ms. Bond's direct.

BY MS. WILKINSON:

Q. Ms. Bond, you're familiar with the game Call of Duty, aren't you?

A. I am.

Q. And how long has Call of Duty been on Xbox?

A. As far as I know, as long as there's been Xbox and Call of Duty.

Q. Can you just give a brief description of what the game Call of Duty is?

A. Yeah. It's a game -- it has an annual version of the game, and it's a game about being a savior in a war scenario and then they have different war scenarios -- World War II, modern warfare -- that they have in installments over time.

Q. Is it a multiplayer game?

A. Yes, it's a multiplayer game.

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1 Q. And cross platform?

2 A. And cross platform.

3 Q. Does Call of Duty have a free-to-play version?

4 A. It does.

5 Q. Okay. Can you explain what that is?

6 A. So a free-to-play version of the game, you don't pay
7 anything upfront to play the game. You can play it for free,
8 but then you can buy items in the game -- coins, outfits,
9 materials, maps -- and that is how the developer makes money
10 from the game.

11 Q. Is there a free-to-play version of Call of Duty on
12 console?

13 A. Yes.

14 Q. Is there also a free-to-play Call of Duty on mobile?

15 A. Yes.

16 Q. Are both of those games successful economically?

17 A. Yes.

18 Q. And let's start with today before the transaction. Is
19 Call of Duty on PlayStation?

20 A. Yes.

21 Q. Is it on Xbox?

22 A. Yes.

23 Q. Is it on Nintendo Switch?

24 A. Yes.

25 Q. It is? Call of Duty?

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1 **A.** Oh, no. Sorry. I thought you were pointing to the
2 series S.

3 **Q.** Oh, yes, you're right. Is it available on S?

4 **A.** Yes.

5 **Q.** Is it available on series X?

6 **A.** Yes.

7 **Q.** Is it available on the Nintendo Switch?

8 **A.** No, it's not.

9 **Q.** Is Call of Duty a must-have game?

10 **A.** No.

11 **Q.** Have you in the past negotiated with Mr. Kotick and others
12 at Activision to keep Xbox on -- excuse me -- to keep Call of
13 Duty on Xbox?

14 **A.** Yes.

15 **Q.** And generally how do those contracts or agreements work in
16 terms of working with a third party to get their game on your
17 platforms?

18 **A.** So the way it works is the publisher or developer agrees
19 to place their game on the platform and to sell their game or
20 any content related to the game, and we take a percentage of
21 whatever the final retail price is that the game is sold for.

22 **Q.** If there is monetization in the game, do you also get a
23 percentage of that?

24 **A.** Yes.

25 **Q.** What is that called?

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1 **A.** It's called in-game monetization or sometimes it's called
2 DLC, which stands for downloadable content.

3 **Q.** When you refer to the splitting of the revenues with the
4 publisher, is that called a rev share?

5 **A.** Yes.

6 **Q.** And do you have a customary rev share that you -- that you
7 use with your developers and your contracts?

8 **A.** Yes.

9 **Q.** What is that?

10 **A.** The majority of publishers and developers the rev share is
11 70/30.

12 **Q.** Who gets the 70 and who gets the 30?

13 **A.** The publisher or the developer gets the 70 and Xbox gets
14 the 30.

15 **Q.** And when you do that rev share, it applies to the in-game
16 monetization as well?

17 **A.** It does.

18 **Q.** How are you able to keep track of all of that?

19 **A.** All of the publishing systems that I spoke about that my
20 team runs, it keeps track of all that.

21 **Q.** We didn't talk about it earlier, but do you oversee some
22 of the engineers at Xbox?

23 **A.** I do.

24 **Q.** What do they do?

25 **A.** They do two things. They develop the tools that game

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1 companies use when they want to bring their game to Xbox to
2 make sure it runs optimally on Xbox, and then they run the back
3 end of the store, which we call publishing. So when --
4 everything about when you put the game on and it goes through
5 the pipeline and you set pricing or make adjustments or run a
6 promo, all of that infrastructure is also my team.

7 **Q.** What is a development kit?

8 **A.** So when you build a console, it has an operating system
9 and it has a system architecture that is specific to that
10 console.

11 So in order for a developer to ensure that the game runs
12 and is optimal on that console, we send them a development kit
13 which essentially is all of the software, your operating
14 system, but customized so the developer can easily use it.
15 It's a physical thing that we send to them, and then they use
16 it as part of finalizing the development of the game and
17 ensuring that it works on the console.

18 **Q.** Do developers want to get those dev kits as early as they
19 can?

20 **A.** Yes.

21 **Q.** When you're launching a new console, is that especially
22 important?

23 **A.** It is.

24 **Q.** Why?

25 **A.** Because the system, the architecture, the hardware is new,

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1 it's different. So they will have dev kits for the previous
2 generation, but they are not the right ones to make sure that
3 the games will run on the new generation.

4 So they want to get the kits as soon as possible so they
5 can understand all of those things and start working as soon as
6 possible to make sure that the game runs.

7 **Q.** So the 8th generation Xbox is different than the
8 current --

9 **A.** Yes.

10 **Q.** -- Xbox?

11 **A.** Yes.

12 **Q.** So when you were going to launch this 9th generation of
13 Xbox, did you have to provide dev kits to your developers?

14 **A.** Yes.

15 **Q.** And what games did you want to put on or make available on
16 Xbox when you were launching the newest version?

17 **A.** I wanted every game that was on the previous generation to
18 be on the new generation.

19 **Q.** Okay. And was Call of Duty on the previous generation of
20 Xbox?

21 **A.** Yes.

22 **Q.** Did you have other large, well-known games on Xbox?

23 **A.** Yes.

24 **Q.** Can you give a few examples?

25 **A.** FIFA, Madden, Fortnite, NBA 2K, Assassin's Creek.

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1 Q. Thank you.

2 When was the launch of the newest generation of Xbox?

3 A. It was December 2020.

4 Q. Before that happened, as part of your job and your team's
5 job, did you come to agreements with third parties to make sure
6 that their games could be on your new generation of console?

7 A. Yes.

8 Q. And were you able to get all of those previous games onto
9 your newest generation of Xbox?

10 A. Yes.

11 Q. Was there one company that made it a little more difficult
12 for you to get their game on your newest console?

13 A. There was.

14 Q. Was there one company that was probably the last company
15 to finally agree to get on your newest console?

16 A. There was.

17 Q. Who was that?

18 A. Activision.

19 Q. And did you engage in some lively negotiations with them?

20 A. We did.

21 Q. And did you agree ultimately to a different rev share than
22 the customary rev share?

23 A. We did.

24 Q. And briefly, without revealing those numbers, can you
25 explain why you did that?

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1 **A.** Well, it was important to us to meet the customer
2 expectation that the games that were on the previous generation
3 were on this generation.

4 It was the last one and we wanted -- the team was not
5 willing to begin working on the dev kits until the agreement
6 was reached, and so we wanted them to do that work so that it
7 would launch at the same time that it launched anywhere else.

8 **Q.** Meaning the Call of Duty team wasn't willing to design
9 it --

10 **A.** Yes.

11 **Q.** -- or adapt it to your console until you had an agreement
12 signed?

13 **A.** That's correct.

14 **Q.** Okay. Go ahead.

15 And during your discussions with Mr. Kotick and others,
16 did he talk about whether he was going to be on the new
17 PlayStation?

18 **A.** He did.

19 **Q.** And at the time that you were launching Xbox, was
20 PlayStation already also going to launch its latest generation?

21 **A.** It was.

22 **Q.** All right. Twitch had already been launched?

23 **A.** Switch.

24 **Q.** Switch. Sorry. I keep saying "Twitch." Sorry.

25 And when you measure kind of the success of a console, is

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1 it normal to measure against the console that gets launched at
2 or around the same time yours does?

3 **A.** That's normal.

4 **Q.** So by the time you were negotiating with Activision to get
5 COD onto Generation 9, did you know whether COD was going to be
6 on the PlayStation console?

7 **A.** Yes.

8 **Q.** And did Activision use that in their negotiations with
9 you?

10 **A.** Yes.

11 **Q.** How so?

12 **A.** It was clear that Call of Duty would be on the new
13 PlayStation, and they -- that would have been not good for Xbox
14 if it was not also on the Xbox when we were launching at the
15 same time.

16 **Q.** Did they suggest to you, without telling you exactly the
17 numbers, that they had a different rev share with
18 PlayStation/Sony than you were offering them originally?

19 **A.** They did.

20 **Q.** They made that quite clear to you?

21 **A.** Very clear.

22 **Q.** Okay. And did Mr. Kotick or anybody say anything to you
23 about whether he would ultimately agree to put COD onto the new
24 generation Xbox if you did not pay a similar -- or agree to a
25 similar rev share?

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1 **A.** He was clear that if we did not move beyond the standard
2 rev share, that he intended to not place Call of Duty on the
3 new Xbox.

4 **Q.** Did you and Mr. Spencer make a decision at that time
5 whether you accede to his --

6 **A.** We did.

7 **Q.** -- demands?

8 And why did you do that at the very end?

9 **A.** Timing was limited. We had players whose expectations we
10 wanted to meet, and so we ultimately made the decision that it
11 was the best thing for the business.

12 **Q.** Do -- do publishers sometimes offer or console makers ask
13 for certain types of exclusivity or marketing rights?

14 **A.** Yes, they do.

15 **Q.** Have you done that in the past?

16 **A.** Um...

17 **Q.** "You" meaning Xbox.

18 **A.** Yes, in the past.

19 **Q.** And at some point did you have a marketing or a
20 co-marketing agreement with Xbox -- with Call of Duty and
21 Activision?

22 **A.** Yes. My understanding is Xbox did before I was at Xbox.

23 **Q.** So that was not in existence when you were negotiating
24 with Activision in 2020?

25 **A.** No, it was not.

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1 Q. And were you aware of whether Sony had some exclusive
2 marketing rights or some timed exclusivity with regard to Call
3 of Duty that you did not?

4 A. Yes, we were aware.

5 Q. How did you become aware of that?

6 A. Um, when the marketing exclusivity agreements expire, then
7 when these things happened, Activision came to us and said,
8 "Would you like to bid for it?"

9 We ultimately didn't, but we understood then the term of
10 the marketing agreement and that Sony received it.

11 Q. And why would any company want that kind of limited or
12 special marketing exclusive?

13 A. Well, when you build a console, you can't really see the
14 benefits of what's inside the box and -- unless it is
15 manifested in a game. And so those type of marketing
16 agreements give a specific -- a game experience that the
17 company could point to to say, "Hey, look it, this is what
18 this -- you know, what PlayStation can do."

19 Q. Were you allowed to market the COD being on Xbox during a
20 term when PlayStation 5 had some kind of marketing agreement
21 with Activision?

22 A. There were very clear limits to what we could say.

23 Q. You weren't made aware of the contract terms?

24 A. No.

25 Q. But if you wanted to come to them and say, "Day one we

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1 want to talk about Call of Duty being on PlayStation 5," what
2 was the response?

3 **A.** So we don't know exactly what the terms are, but our team
4 would want to talk about it so we would go to the Activision
5 team and say, "Hey, we'd like to say that the game is coming
6 this year."And then they will tell us that we can't or we can
7 only say it in a certain way or at a certain time.

8 So, for example, a year ago we wanted to show that Call of
9 Duty Vanguard was launching on Xbox, and we were told that we
10 could not say it on YouTube or any other place where customers
11 that were not our own customers could see it and that we had to
12 hold for a period of time based off of the agreements because
13 of that.

14 **Q.** Is that an advantage for PlayStation to have that, you
15 know, right to do it first versus Xbox?

16 **A.** I believe they value it, which is why they asked for it,
17 because it allows for them to make it seem as though the game
18 is not coming to Xbox.

19 **THE COURT:** When you say so you could put it on your
20 website, you could put it on your website or but you
21 couldn't -- or in direct e-mails to your current Xbox customers
22 but you couldn't put it on YouTube or Facebook ad or something?

23 **THE WITNESS:** Yeah. So, again, they wouldn't -- I
24 could never find out exactly what it is. It's almost like I
25 had to, like, ask questions to figure it out.

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1 But you're right. Our website was fine. Our own Twitter
2 channels are fine. But when we film a showcase, that is people
3 can watch it live on YouTube and other places and then the
4 asset lives afterwards and at the end we wanted to just put up
5 a slate that said, "Here are all the games that are coming in
6 the next year," and we were told that we could not say that
7 Call of Duty was coming in the next year.

8 **THE COURT:** That only applied in the separately
9 negotiated revenue share was just Call of Duty, not all
10 Activision titles?

11 **THE WITNESS:** Are you talking for Sony?

12 **THE COURT:** No. For Xbox you said that you negotiated
13 a different revenue share. Was that just Call of Duty or was
14 that all Activision titles?

15 **THE WITNESS:** They had a very specific agreement
16 towards -- about Call of Duty, and then there were a couple of
17 other specifics around other titles.

18 **THE COURT:** Okay.

19 **BY MS. WILKINSON:**

20 **Q.** So when you wanted to put all the games that were on Xbox
21 behind you, you could not put on Call of Duty?

22 **A.** Nope.

23 **Q.** Were there any other big games that you had, like FIFA or
24 any of those, that you could not feature?

25 **A.** Another one I recall was Hogwarts Legacy.

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1 **Q.** And who makes and publishes Hogwarts Legacy?

2 **A.** Warner Brothers Interactive.

3 **THE COURT:** So why did Activision, then, control
4 whether you could put -- you mean that was a separate agreement
5 with Warner?

6 **THE WITNESS:** Sony, it's my understanding was, had an
7 agreement with Warner Brothers Interactive that had some
8 similarities.

9 **BY MS. WILKINSON:**

10 **Q.** Let me see if I can clarify. I don't think I'm being
11 clear so let me try to be clear.

12 **A.** All right.

13 **Q.** You have an agreement to have COD on your Xbox; right?

14 **A.** Yes.

15 **Q.** As of 2020?

16 **A.** Yes.

17 **Q.** Most recently? And that agreement is still in place?

18 **A.** Yes.

19 **Q.** Other -- I mean, other console players and the only other
20 one that has COD is PlayStation; right?

21 **A.** Yes.

22 **Q.** You have not seen their agreement, but you believe they
23 have an agreement that allows them to get special benefits or
24 marketing advantages; right?

25 **A.** Correct.

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1 **Q.** One of those might be that they prohibit or they -- and
2 Activision agrees that they won't feature their game on other
3 platforms' advertising?

4 **A.** Yes, for some period of time or in some ways.

5 **Q.** So when you asked them to say "Can we put it up there,"
6 most people would say "Sure," right, because they want you to
7 advertise their game? And they say no basically telling you
8 they can't?

9 **MS. FLEURY:** Objection to leading, Your Honor.

10 **BY MS. WILKINSON:**

11 **Q.** Is that right? Well you explain it.

12 **THE COURT:** Okay. Sustained.

13 **MS. WILKINSON:** Yes.

14 **BY MS. WILKINSON:**

15 **Q.** Why do they -- what's your understanding of why they're
16 saying no?

17 **A.** My understanding of why they say no is that they have
18 entered into an agreement with Sony that stipulates that
19 requirement.

20 **Q.** And there's no way today to get Call of Duty on a Switch.

21 **A.** That's correct.

22 **Q.** Let's turn to about the time when the transaction was
23 announced.

24 Do you recall about when you found out that you, meaning
25 Xbox, were seriously considering acquiring Activision?

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1 **A.** Yes. It was December 2021.

2 **Q.** When was the actual transaction announced to the public,
3 if you recall?

4 **A.** The day after Martin Luther King Day, January 2022.

5 **Q.** And before the public announcement, did you and others at
6 Xbox make a plan how you were going to communicate to your
7 partners and other folks once the deal was announced publicly?

8 **A.** Yeah, we did.

9 **Q.** Were you involved with that?

10 **A.** I was.

11 **Q.** Generally what was the plan?

12 **A.** The plan was to reach out to our partners and those we
13 worked within the industry immediately after announced to just
14 emphasize to them our -- that it is business as usual for us,
15 that they're as valuable to us as partners as always, and to
16 remind them that we would remain separate companies, you know,
17 for the upcoming period.

18 **Q.** Do you consider PlayStation and Sony a competitor?

19 **A.** Yes.

20 **Q.** Are they also a partner?

21 **A.** Yes.

22 **Q.** What about Nintendo Switch?

23 **A.** Exactly the same, both a competitor and a partner.

24 **Q.** Did you have a plan after the transaction was announced to
25 contact the folks at Sony and the folks at Nintendo to talk

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1 about what would happen going forward once you acquired
2 Activision?

3 **A.** Yes.

4 **Q.** Were you involved with the conversations with Sony?

5 **A.** No.

6 **Q.** Who was?

7 **A.** To my understanding, Bobby Kotick spoke to Jim Ryan and
8 Phil Spencer and Satya Nadella speak to the CEO of
9 Sony Corporation.

10 **Q.** Were you involved with the conversations with Nintendo?

11 **A.** I was.

12 **Q.** And what was the purpose of communicating to Nintendo
13 about the acquisition?

14 **A.** For us, we believe that that type of transparency and
15 proactive reach -- like, outreach with our partners is
16 important. We just try and do it as a matter of practice.

17 So the purpose was just to say: We did announce this.
18 You know, our commitment to our partnership is what it always
19 has been. And we find that that personal moment in touch is
20 really important.

21 **Q.** At that time did Nintendo have any Activision content on
22 its Switch?

23 **A.** I believe it did, yes.

24 **Q.** When you were -- did you communicate with them shortly
25 after the transaction was announced?

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1 **A.** Yes, we -- we sent an e-mail, I believe, hours after the
2 transaction was announced, and then out of that set up a call
3 with Doug Bowser and Steve Singer.

4 **Q.** Who are they?

5 **A.** Doug Bowser is the head of Nintendo North America and
6 Steve Singer leads partnerships for him.

7 **Q.** During that conversation, did you have any discussions
8 about putting Activision content on the Switch?

9 **A.** Yes, we did.

10 **Q.** Who initiated that?

11 **A.** I believe Phil opened up the call expressing the sentiment
12 that we did to everyone else about our continued commitment.
13 At that point Doug Bowser said that he was, you know, thrilled
14 to hear this announcement and that he has long wished to have
15 Call of Duty be on the Switch.

16 At that point Phil replied that actually we would love to
17 be able to do that, to build on the fantastic partnership that
18 we had with them on Minecraft on the Switch.

19 **Q.** At that point, did you come to a written agreement or
20 contract with Nintendo that you would provide Call of Duty?

21 **A.** No.

22 **Q.** Why didn't you make that agreement back in January?

23 **A.** Well, we don't normally do deals for content and assets
24 that we don't own, and so that did not feel like a natural
25 thing to do in that moment.

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1 **Q.** Despite that, did there come a time over the past year
2 when you did come to a written agreement to provide Call of
3 Duty to Nintendo?

4 **A.** Yes.

5 **Q.** What was the genesis or the purpose of that?

6 **A.** Well, as the process progressed, we continued to emphasize
7 our commitment to maintain Call of Duty on all platforms where
8 it currently is and continue to expand it, but it became very
9 clear that we wanted to make our intention -- back it up with
10 actions and so we decided to take the step of entering into a
11 contract with Nintendo in order to emphasize our absolute
12 commitment.

13 **Q.** Were you involved with negotiating that agreement?

14 **A.** Yes, my team negotiated that agreement.

15 **Q.** Okay. Let's turn to RX3019, which is tab 2.

16 **MS. WILKINSON:** And that is a confidential document,
17 Your Honor, so we're just going to discuss it generally.

18 **THE COURT:** Sure.

19 **THE WITNESS:** Okay.

20 **BY MS. WILKINSON:**

21 **Q.** Take a look at it and, Ms. Bond, do you see on page 2,
22 which is really the one-page agreement, your signature?

23 **A.** I do.

24 **Q.** And is this a letter dated November 30th, 2022?

25 **A.** Mine says November -- December 7th.

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1 Q. Oh, sorry. I'm looking at the wrong one. Thank you.

2 (Pause in proceedings.)

3 **BY MS. WILKINSON:**

4 Q. And to whom is this letter addressed?

5 A. Shadab Hassan.

6 Q. Without revealing the detail of the terms, what was the
7 purpose of this letter of intent?

8 A. The purpose of this letter of intent was to agree on our
9 intention to place future versions of Call of Duty natively on
10 Nintendo platforms.

11 Q. When you say "natively," what kind of work would that
12 require you to do once you acquire Call of Duty?

13 A. Very similar work to what I actually described that
14 developers do for the game to run on Xbox. We would need to
15 work with the Nintendo development kit and tune the game so
16 that it could run on the Nintendo architectural and software
17 stack.

18 **MS. WILKINSON:** Your Honor, we'd move in RX3019.

19 **THE COURT:** 3019 admitted.

20 (Trial Exhibit 3019 received in evidence.)

21 **BY MS. WILKINSON:**

22 Q. Did there come a time when you came to a full agreement
23 with Nintendo?

24 A. Yes.

25 Q. Let's take a look at tab number 4, which is RX1212?

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1 **A.** Great.

2 **Q.** And is that addressed to the same gentleman?

3 **A.** It is.

4 **Q.** Did you sign this agreement?

5 **A.** I did.

6 **Q.** What is the term of this agreement?

7 **A.** Ten years.

8 **Q.** Have you ever signed a ten-year agreement to provide
9 content to another platform?

10 **A.** Not before I signed this one, no.

11 **Q.** Are you aware of any agreement in your industry where
12 someone agrees for ten years to provide content to a platform?

13 **A.** Not before this one, no.

14 **Q.** And what will occur because you've signed this agreement
15 once the transaction closes?

16 **A.** For the next ten years, all future versions of Call of
17 Duty will be available for Nintendo's platforms.

18 **Q.** Did you also make calls to Valve after the transaction was
19 announced?

20 **THE COURT:** Do you want to admit 1212?

21 **MS. WILKINSON:** Oh, I do. Thank you, Your Honor.

22 **THE COURT:** 1212 admitted.

23 (Trial Exhibit 1212 received in evidence.)

24 **MS. WILKINSON:** It will help.

25 **THE COURT:** This one is not under seal.

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1 **MS. WILKINSON:** It is.

2 **THE COURT:** It is?

3 **MS. WILKINSON:** Uh-huh.

4 **THE COURT:** Okay. All right.

5 **MS. WILKINSON:** Oh, wait a minute.

6 **THE COURT:** It is not on your list.

7 **MS. WILKINSON:** Yes, 1212 is not under seal.

8 **THE COURT:** Not under seal, okay.

9 **BY MS. WILKINSON:**

10 **Q.** Ms. Bond, I want to go back to tab number 1 --

11 **A.** Okay.

12 **Q.** -- which that document is RX1184, which is under seal.

13 And after the transaction was announced, did you also
14 reach out to people at Valve?

15 **A.** Yes.

16 **Q.** Can you say explain what is Valve?

17 **A.** Valve runs a PC game store called Steam.

18 **Q.** Is that successful?

19 **A.** It is. It's the largest PC game store on PC.

20 **Q.** How does it operate?

21 **A.** Essentially you download an application, it gives you
22 access to the store, and then you can go in there and you can
23 purchase any PC game through that. And also when you kind of
24 launch the game, it runs some of the back-end services
25 associated with the game.

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1 **THE COURT:** It's fully online?

2 **THE WITNESS:** Um, well, you do download -- you do
3 download the game to your device.

4 **THE COURT:** I mean, it's not like GameStop?

5 **THE WITNESS:** No, it's not like GameStop. It's not a
6 retail store. Yeah, that's right.

7 **BY MS. WILKINSON:**

8 **Q.** Did you have conversations where you offered to them to
9 keep Call of Duty on Valve or in Steam?

10 **A.** Yes.

11 **Q.** Okay. Do you know whether Call of Duty has always been
12 available in Steam?

13 **A.** No, it has not.

14 **Q.** So if the transaction doesn't go through or if we look at
15 today, it's not available through Steam?

16 **A.** It is available on Steam today, but it has not always been
17 available on Steam.

18 **Q.** And do you recall when it started to become available on
19 Steam?

20 **A.** I believe that that change -- and I don't know what
21 happened before the recent period happened with the most recent
22 version of Call of Duty -- that it was available on Steam. It
23 might have also been Vanguard, but I don't recall precisely,
24 but it's within the last two years.

25 **Q.** And this is an e-mail, right, from you to the folks at

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1 Valve?

2 **A.** Yes.

3 **Q.** And it is a letter agreement; correct?

4 **A.** It is.

5 **Q.** And on page 002 of that, your signature is there?

6 **A.** It is.

7 **Q.** Their signature is not; right?

8 **A.** Correct.

9 **Q.** Why is that?

10 **A.** Valve believes strongly that content should be on their
11 platform because they build a great platform and experience for
12 players and developers, and they do not want to be seen to be
13 signing contracts that, you know, lock up or drive commitments
14 to content over ten-year periods of time.

15 They don't have any other such agreements, and they
16 believe strongly that they should earn the business of their --
17 the developers who put on their platform day in and day out,
18 and so they told us that they had had no need to sign that
19 agreement and that they believed us when we said that we would
20 continue to provide it on Steam.

21 **MS. WILKINSON:** Your Honor, we'd move in RX1184.

22 **THE COURT:** Okay. Admitted.

23 The first page of it is not sealed; right? Just the
24 e-mail?

25 **MS. WILKINSON:** I have it. We marked -- we printed it

BOND - DIRECT / WILKINSON

1 out on yellow pages so I don't usually make a mistake, but it
2 is under seal?

3 **MR. KILARU:** The judge is correct.

4 **MS. WILKINSON:** Okay.

5 **THE COURT:** It should not be under seal?

6 **MS. WILKINSON:** It should not be under seal.

7 **THE COURT:** So the cover e-mail is not under seal, the
8 proposed --

9 **MS. WILKINSON:** Only the proposed agreement --

10 **THE COURT:** -- agreement is.

11 **MS. WILKINSON:** -- which is page 002.

12 **THE COURT:** It will be admitted under those terms.

13 (Trial Exhibit 1184 received in evidence.)

14 **BY MS. WILKINSON:**

15 **Q.** At the time you announced the transaction, could Nvidia
16 cloud stream Call of Duty?

17 **A.** No.

18 **Q.** Explain what Nvidia is.

19 **A.** Nvidia is a chipset manufacturer and provider, and they
20 have a service called GeForce NOW, and what GeForce NOW is is
21 it makes it possible to stream PC games natively from the
22 cloud.

23 **Q.** So they do that right now?

24 **A.** They do.

25 **Q.** Have they been successful?

BOND - DIRECT / WILKINSON

1 **A.** Um, you'd have to ask them their view on their level of
2 success.

3 **Q.** Okay. Right now they cannot, though, stream the PC
4 version of COD for their customers?

5 **A.** No, they cannot.

6 **Q.** When a customer is using Nvidia, do they get the game from
7 GeForce 5 or do they have to bring their own copy?

8 **A.** The way it works is a customer goes and they purchase the
9 game, let's say in this case, from Steam. Then they go to
10 GeForce NOW, and they sign up now for a GeForce NOW
11 subscription and they enter in their account details.

12 That enables GeForce NOW to verify that the customer has
13 the right to be able to play that game because they have
14 purchased it through Steam.

15 Then that game is downloaded, you know, in a remote place
16 in the cloud, and the customer can play it from there and
17 stream it to any device where GeForce NOW works, a low-powered
18 PC, a MacBook, a phone.

19 **THE COURT:** So it's not just PC games that you can --

20 **THE WITNESS:** It is just PC games.

21 **THE COURT:** Just PC games. But you can stream it to a
22 non-PC?

23 **THE WITNESS:** Exactly.

24 **THE COURT:** Got it.

25 \\

BOND - DIRECT / WILKINSON

1 **BY MS. WILKINSON:**

2 **Q.** Let's turn to RX1211, which is tab 5. Can you take a look
3 at that agreement?

4 **A.** (Witness examines document.)

5 **Q.** Did there come a time when you and your team negotiated
6 with Nvidia to provide COD when the transaction closes so they
7 can stream it for their customers?

8 **A.** Yes.

9 **Q.** Now take a look at the back of that document. It's -- is
10 that your signature on page 12?

11 **A.** Yes.

12 **MS. WILKINSON:** Your Honor, we move in RX1211.

13 **THE COURT:** Admitted.

14 (Trial Exhibit 1211 received in evidence.)

15 **BY MS. WILKINSON:**

16 **Q.** Why, if you didn't own COD at the time, did you sign an
17 agreement to allow COD to be streamed?

18 **A.** Similar to the situation with Nintendo, it became clear to
19 us that we needed to back up our commitments with actions, and
20 so we took the step to sign an agreement to make our commitment
21 absolutely unequivocally clear.

22 **Q.** Okay. Look at the date of this contract. It's
23 February 20th, 2023?

24 **A.** Yes.

25 **Q.** And you know that the FTC sued Microsoft in December of

BOND - DIRECT / WILKINSON

1 2022; correct? Around that time?

2 **A.** Yes.

3 **Q.** And you're familiar with the allegations which include
4 that you, Xbox, would withhold COD from other competitors;
5 right?

6 **A.** I am familiar.

7 **Q.** Including PlayStation?

8 **A.** Yes.

9 **Q.** And other streaming services?

10 **A.** Yes.

11 **Q.** So when you signed this, was this in part in response to
12 the allegations by the FTC and other regulators that you might
13 not actually do what you said you were going to do?

14 **A.** Yes. We wanted to make it absolutely clear that we would
15 do it and we wanted to make a legally binding commitment to
16 demonstrate that.

17 **Q.** And attached to that document is there an actual list of
18 the ABK games that you will provide when the transaction
19 closes?

20 **A.** Yes.

21 **Q.** And Exhibit B also lists additional games; is that right?

22 **A.** Yes. This lists Microsoft first-party games.

23 **Q.** So in this contract did you not only agree to provide
24 Activision games but you agreed to provide games that are
25 first-party games on Xbox?

BOND - DIRECT / WILKINSON

1 **A.** Yes.

2 **Q.** And will that happen regardless of whether the transaction
3 goes through?

4 **A.** Yes. In fact, we have already launched.

5 **Q.** How long a term is this contract with Nvidia?

6 **A.** Ten years.

7 **Q.** And will it allow them to -- this might be an obvious
8 question, but if someone buys it on the first day the new Call
9 of Duty game is published, they, then, can of course stream it
10 the first day --

11 **A.** Yes.

12 **Q.** -- correct?

13 So this is just a way to get the game to another device
14 like we've been talking about?

15 **A.** Exactly.

16 **Q.** And let's look at tab 6, if you could.

17 **A.** (Witness examines document.)

18 **Q.** Did you also agree and sign other contracts with other
19 cloud streaming services?

20 **A.** We did.

21 **Q.** Is RX1221 an example of that -- another example of that?

22 **A.** I don't have that number here.

23 **THE COURT:** It's the other number. It's the duplicate
24 3024 that's in the binder.

25 **THE WITNESS:** That is the number I have, yes.

BOND - DIRECT / WILKINSON

1 **MS. WILKINSON:** Sorry. I have the wrong number.

2 **BY MS. WILKINSON:**

3 **Q.** And is that a cloud game licensing agreement?

4 **A.** It is.

5 **Q.** Between whom?

6 **A.** Between Microsoft and Boosteroid Ukraine.

7 **Q.** What is Boosteroid?

8 **A.** Boosteroid is a cloud streaming service.

9 **MS. WILKINSON:** Your Honor, we'd move that document
10 into evidence.

11 **THE COURT:** Okay. 3024, also known as 1221, is
12 admitted and that like 1211 is under seal.

13 **MS. WILKINSON:** Yes.

14 (Trial Exhibit 3024 received in evidence.)

15 **BY MS. WILKINSON:**

16 **Q.** What is the term of this agreement?

17 **A.** Ten years.

18 **Q.** And turn to tab number 7. And I'm not sure I have the
19 right RX number, so can you tell me what the RX number is there
20 at the bottom?

21 **A.** 3025.

22 **MS. WILKINSON:** Your Honor, we move in RX3025.

23 **THE COURT:** All right. Also known as 1222 admitted
24 also under seal.

25 (Trial Exhibit 3025 received in evidence.)

BOND - DIRECT / WILKINSON

1 **BY MS. WILKINSON:**

2 **Q.** Is this also a cloud gaming license agreement?

3 **A.** It is.

4 **Q.** With whom?

5 **A.** This is with Ubitus KK.

6 **Q.** Where is Ubitus located, if you know?

7 **A.** You know what? I don't remember its location.

8 **Q.** Okay. And what is the term of this agreement?

9 **A.** Ten years.

10 **Q.** Are there people on your team who also participated in
11 negotiating these agreements?

12 **A.** Yes.

13 **Q.** Is one of them coming to court next week to talk about
14 these agreements?

15 **A.** Yes.

16 **Q.** Look at the signature there. Who signed it on behalf of
17 Microsoft? It's on page 9 -- excuse me -- 8.

18 **A.** Lori Wright.

19 **Q.** Does Ms. Wright work for you?

20 **A.** She does.

21 **Q.** What is her job?

22 **A.** Ms. Wright leads all commercial and business development
23 for Xbox.

24 **Q.** Take a look at Exhibit A, which is page 9.

25 **A.** Yes.

BOND - DIRECT / WILKINSON

1 Q. Without revealing the details, does that list additional
2 games that Ubitus may stream?

3 A. It does.

4 Q. And will those games be streamed if the deal does not go
5 through?

6 A. Yes.

7 Q. Okay. Turn to tab 8, please. I believe that's RX3027.

8 A. Yes.

9 Q. What is this?

10 A. This is a letter of intent with EE Limited.

11 Q. Is that part of British Telecom?

12 A. It is.

13 MS. WILKINSON: Your Honor, we move in RX3027.

14 THE COURT: Admitted.

15 (Trial Exhibit 3027 received in evidence.)

16 BY MS. WILKINSON:

17 Q. Is this another cloud gaming agreement?

18 A. It is.

19 Q. Was this also signed by Ms. Wright? It's on page 4.

20 A. (Witness examines document.) It is.

21 Q. If you can turn to page 9, is this another cloud gaming
22 agreement?

23 A. It is.

24 Q. With whom?

25 A. Nware.

BOND - DIRECT / WILKINSON

1 Q. Has this been signed by Lori Wright on behalf of
2 Microsoft?

3 A. Yes.

4 Q. Will it allow EE to stream Call of Duty after the
5 transaction?

6 A. Yes.

7 Q. Now, in the agreement with Nvidia, was there also an
8 agreement to provide additional -- an additional license to
9 Nvidia?

10 A. There was a separate agreement.

11 Q. Were you involved in negotiating that?

12 A. No.

13 Q. After the transaction is completed, will you fulfill your
14 obligations to provide Call of Duty to all the -- your
15 contractual parties?

16 A. Absolutely, yes.

17 Q. Do you intend to put Call of Duty into Game Pass when
18 you're allowed to under the previous contract?

19 A. Yes.

20 Q. Pursuant to the -- I'm sorry.

21 Pursuant to the existing contract between PlayStation and
22 Activision?

23 A. Yes.

24 Q. Is it your understanding that can't happen until January
25 of 2025?

Thank you very much, Ms. Bond.

Are you the final decision maker with respect to whether all these agreements are followed? In other words, you just testified that you will follow them, but are you saying that you are the final decision maker?

THE WITNESS: No. I would consider Satya Nadella to be the final decision maker as to whether or not Microsoft abides by its legal agreements.

THE WITNESS: The CEO of Microsoft.

Q. Does Mr. Spencer also have authority over the contracts?

A. He does and I do, and I believe Microsoft would follow its legal commitments, but I would not consider myself the most senior person around here.

(Laughter)

Q. And as you were discussing the transaction announcement and after it was announced, has Mr. Nadella made clear that he agrees with your strategy to provide Call of Duty on as many

BOND - CROSS / FLEURY

1 platforms to as many devices to as many people as possible?

2 **A.** Mr. Nadella has made it absolutely clear he was aware of
3 all of these agreements and supported them being completed, and
4 Microsoft Corporation also does abide by its legal agreements.

5 **Q.** And as a last example of that, when you bought ZeniMax,
6 they had a legal agreement with PlayStation to provide
7 exclusive content to them; correct?

8 **A.** They did.

9 **Q.** And despite the fact that you couldn't get access to it,
10 did you honor your obligation and contract and provide it to
11 PlayStation?

12 **A.** Absolutely, yes.

13 **MS. WILKINSON:** No further questions, Your Honor.

14 **THE COURT:** Any cross? That was a rhetorical
15 question.

16 (Laughter)

17 **CROSS-EXAMINATION**

18 **BY MS. FLEURY:**

19 **Q.** Good afternoon, Ms. Bond.

20 **A.** Good to see you.

21 **Q.** Give me one moment to get you some materials.

22 **A.** Thank you.

23 **MS. FLEURY:** Your Honor, may I approach?

24 **THE COURT:** Yes.

25 (Pause in proceedings.)

BOND - CROSS / FLEURY

1 **THE COURT:** You may proceed.

2 **BY MS. FLEURY:**

3 **Q.** Ms. Bond, video game content has driven mergers activity
4 for Xbox and its competitors; correct?

5 **A.** Yes.

6 **Q.** Since 2021, there have been multiple acquisitions of
7 gaming companies by Xbox; correct?

8 **A.** Yes.

9 **Q.** Over the last five years, Xbox has acquired a number of
10 companies and incorporated them into Xbox Game Studios;
11 correct?

12 **A.** I'm not aware of the exact manner of incorporation.

13 **Q.** But Xbox has acquired a number of companies?

14 **A.** Yes.

15 **Q.** With video game content; correct?

16 **A.** Correct.

17 **Q.** How many?

18 **A.** I don't recall the number right now.

19 **Q.** ZeniMax was one of those companies; correct?

20 **A.** Yes.

21 **Q.** And as you testified on direct, when Microsoft signs a
22 contract with a third-party video game publisher for a game, a
23 percentage of the proceeds from that game go to Microsoft and a
24 percentage go to the publisher; correct?

25 **A.** Yes.

BOND - CROSS / FLEURY

1 Q. And there is a standard revenue split that I believe you
2 testified to on direct; correct?

3 A. There's a revenue split that most developers and
4 publishers have.

5 Q. And you testified that that revenue split is usually
6 70/30; correct?

7 A. Yes.

8 Q. So if I buy a game for a hundred dollars, under one of
9 those agreements, \$70 goes to the company that created or
10 licensed the game and \$30 goes to Microsoft; correct?

11 A. Yes.

12 Q. And here is where I may need to vary from the usual
13 procedure based on conversations with opposing counsel about
14 confidentiality, and I will just direct you to the second tab
15 in your document, which is --

16 A. Okay.

17 Q. -- your investigational hearing with the FTC.

18 A. Okay. So this is the PX7033IH?

19 Q. That's correct?

20 A. Okay.

21 Q. And could you please turn to page 110, line 18? Let me
22 know when you're there.

23 A. I see it.

24 Q. And the question there was (as read):

25 "Are there any examples of current games on Xbox that

BOND - CROSS / FLEURY

1 have the current publishers on Scarlet that have the" --
2 "that have a different revenue split?"

3 A. Yep.

4 Q. And do you see the answer that you gave?

5 A. I do.

6 Q. So I will just at this point direct those that have
7 binders to read the answer aloud.

8 Microsoft agrees to that specific revenue split that you
9 just read in situations where it is critical to get that
10 content; correct?

11 A. No.

12 Q. That's not correct?

13 A. On direct I think I described the general situation.
14 There are a number of factors that go into how we determine
15 varying from what the majority of publishers have on revenue
16 split.

17 Q. I'll direct you again to your investigational hearing at
18 page 110. This time line 11. And the question here is (as
19 read):

20 "When would you have this specific revenue split that
21 we've been discussing compared to your standard 70/30
22 revenue split?"

23 And the answer (as read):

24 "The specific revenue split is not our standard
25 revenue split. We would have it in an example in a

BOND - CROSS / FLEURY

1 situation where we believe that it was critical to get
2 that content."

3 Do you see that?

4 **A.** I do.

5 **Q.** And that testimony was truthful and accurate when you gave
6 it?

7 **A.** It is. What I was clarifying now is there can be any
8 number of factors around the content.

9 **Q.** Microsoft does have exclusive games on its platform;
10 correct?

11 **A.** It does.

12 **Q.** And that's at least partially because there are gamers who
13 like the idea that because they chose to buy an Xbox, they get
14 something special?

15 **A.** Yes.

16 **Q.** And Microsoft negotiates for exclusivity provisions in
17 some instances with third parties as we've been discussing;
18 correct?

19 **A.** Yeah. At times, yeah.

20 **Q.** And so, for example, if Microsoft is working with a game
21 developer and agrees to fully finance a game, that's an
22 instance in which you'd agree that that game should be on Xbox
23 but not on other platforms; correct?

24 **A.** Yes. That's different than the way you -- the reason why
25 I hesitated is that's -- that's really Microsoft building a

BOND - CROSS / FLEURY

1 game, yes.

2 Q. And in those instances when Microsoft fully funds a
3 third-party game, in those instances it would just be on Xbox,
4 not on other platforms; correct?

5 A. Well, in that instance it is not a third-party game if we
6 fully finance it. It is a first-party game.

7 Q. Even if the entity that you are financing, even if that
8 entity is not owned by Microsoft; correct?

9 A. We would call that a first-party game, that's correct.

10 Q. And first-party games are generally on Xbox exclusively,
11 not on other platforms; correct?

12 A. No.

13 Q. After ZeniMax was acquired, you were part of the
14 decision-making process that resulted in Starfield being
15 exclusive? I believe you testified to that; correct?

16 A. I was in meetings where the topic was discussed.

17 Q. And I also believe you testified that Phil Spencer made
18 the final call on that decision; correct?

19 A. He did.

20 Q. And Phil Spencer is responsible for the other decisions
21 about exclusivity; correct?

22 A. He is.

23 Q. Exclusivity is something you might market for a given
24 game; correct?

25 A. You could.

BOND - CROSS / FLEURY

1 Q. And Xbox does, in fact, market exclusivity for specific
2 games; correct?

3 A. We do communicate that to our users when that is the case,
4 yes.

5 Q. I want to ask you a little bit more about Game Pass and
6 xCloud.

7 So, first, I think you explained players who stream games
8 to their phone via Game Pass Ultimate are using the Xbox
9 platform; correct?

10 A. What do you mean by "Xbox platform"?

11 Q. Those users are part of the Xbox ecosystem; correct?

12 A. Yes.

13 Q. And streaming to mobile devices is a strategic initiative
14 for Xbox; correct?

15 A. It's an initiative.

16 Q. And that involves leveraging xCloud technology; correct?

17 A. Yes.

18 Q. Before Google Stadia folded, it was a platform people
19 could play games on; correct?

20 A. Yes.

21 Q. It was a platform just like Microsoft Xbox is a platform?

22 A. I don't think it's just like Xbox, no.

23 Q. It was a competitor to Xbox?

24 A. Perhaps.

25 Q. If a player wants to stream an Xbox game on xCloud, today

BOND - CROSS / FLEURY

1 they need to pay for Xbox Game Ultimate. I believe you
2 testified to that; correct?

3 **A.** Yes.

4 **Q.** Microsoft has been evaluating a way to offer an
5 alternative way of accessing xCloud; is that correct?

6 **A.** To what do you refer specifically?

7 **Q.** Why don't we pull back up, if you still have your RX
8 binder --

9 **A.** Yeah.

10 **Q.** -- RX5044 again.

11 **A.** All right. Oh, this one (indicating)?

12 **Q.** Yes. That is, I believe it is the last tab, 10.

13 **A.** Got it.

14 **Q.** So you explained on direct that the four options you see
15 here are all alternatives that consumers can choose?

16 **A.** Yes.

17 **Q.** Are they individual SKUs, S-K-U?

18 **A.** Yeah, that's a good way to talk about them.

19 **Q.** And a SKU -- so Xbox Game Pass Ultimate is a SKU right
20 now; correct?

21 **A.** It is.

22 **Q.** And Xbox Live Gold is a SKU; correct?

23 **A.** Correct.

24 **Q.** A SKU is a distinct thing that a consumer can choose?

25 **A.** Yes.

BOND - CROSS / FLEURY

1 Q. And Xbox would very much like to release a dedicated
2 xCloud SKU; correct?

3 A. Not to my knowledge.

4 Q. Would you keep open the other binder --

5 A. Yeah.

6 Q. -- and turn to your investigational hearing at page 70?

7 A. Yep. 70 in the same one?

8 Q. In tab 2, correct.

9 A. (Witness examines document.)

10 Q. Start at line I believe it's 22.

11 A. I see it.

12 Q. (as read):

13 "QUESTION: Are there any concrete plans to release a
14 dedicated SKU to this product in the future?

15 "ANSWER: I don't know the precise status of our plans
16 right now.

17 "QUESTION: But there's still -- Xbox is still planning to
18 do this; correct?

19 "ANSWER: Xbox would very much like to do it, yes."

20 And that was truthful -- did you -- are you with me?

21 A. I'm with you.

22 Q. That was truthful and accurate testimony when you gave it?

23 A. Yes. This was September 2022. The answer I just gave is
24 relative to now.

25 Q. What has changed since September 2022?

BOND - CROSS / FLEURY

1 **A.** We've continued to get more data about the success and the
2 popularity of xCloud. We've gotten more clear on the costs
3 related to it, and we have signed partners -- partnerships with
4 others who provide those services.

5 **Q.** And also since that time the FTC brought suit against the
6 transaction; correct?

7 **A.** I think that was before this time actually because it was
8 my IH.

9 **Q.** During your investigational hearing; correct?

10 **A.** Yeah.

11 **Q.** I want to ask you a question about Game Pass.

12 Game Pass -- and looking back at this same document that
13 you have in front of you, RX5044, I just want to clarify one
14 thing. I'm sorry I'm going back and forth.

15 **A.** No, it's okay. I got it.

16 **Q.** The Xbox Live Gold option all the way on the right-hand
17 corner, in this option you don't get a content library;
18 correct? If you are a consumer choosing the Xbox Live Gold
19 option, you get two free games a month, but unlike the other
20 options no content library?

21 **A.** That's right.

22 **Q.** PlayStation has a comparable service to this level;
23 correct?

24 **A.** I believe so, but I'm not super close to what their
25 line-up is.

BOND - CROSS / FLEURY

1 Q. For the PlayStation offerings that have content libraries
2 as compared to the Xbox offerings that have content libraries,
3 how many subscribers, roughly, what is the comparison between
4 PlayStation and Xbox?

5 A. I don't have access to PlayStation's confidential
6 information.

7 Q. Would you agree that Game Pass is the market leader when
8 it comes to subscriptions with content libraries?

9 A. I don't know what PlayStation's latest numbers are, and
10 they did recently launch.

11 Q. Do you agree that Game Pass has significantly more
12 subscribers for content libraries with content libraries than
13 PlayStation?

14 A. I can't know for sure without seeing their data.

15 Q. I'd like you to turn to your deposition, page -- that's
16 tab 1, page 219.

17 A. Yeah.

18 Q. Tab 1. Okay.

19 A. (Witness examines document.) Okay.

20 Q. Line 11 -- sorry -- line 14 you were asked (as read):

21 "QUESTION: That bar graph shows that Microsoft has
22 26 million content subscribers; correct?"

23 Your answer (as read):

24 "ANSWER: It does.

25 "QUESTION: And Sony has 3 million content subscribers;

BOND - CROSS / FLEURY

1 correct?

2 **"ANSWER:** That's what the bar graph says."

3 (Pause in proceedings.)

4 **THE WITNESS:** Yes, but I don't know what that bar
5 graph was of, um, and what it was dated. So I just want to be
6 careful in how I'm answering because things change over time,
7 which is why I don't know what this data was showing or what is
8 happening with Sony today.

9 **BY MS. FLEURY:**

10 **Q.** Understood.

11 Fair to say that at the time you gave this testimony and
12 the document you were reviewing, Microsoft had significantly
13 more subscribers for content than PlayStation?

14 **A.** Yes, but I wonder what the comparison was. Like, of the
15 SKUs, what was being compared to what? That's what I'm not
16 sure on actually.

17 **Q.** I want to switch gears and ask you about the agreements
18 that Ms. Wilkinson, Microsoft's counsel, asked you about. I
19 want to start with the Ubitus agreement?

20 **A.** Okay.

21 **Q.** Ubitus is located outside of the U.S.; correct?

22 **A.** Yes.

23 **Q.** It has a small presence in the United States?

24 **A.** I don't know the details of Ubitus' footprint.

25 **Q.** You don't know whether they have any footprint in the

BOND - CROSS / FLEURY

1 United States?

2 **A.** I just don't know for sure. If you say that you've looked
3 into it, I believe you.

4 **Q.** And you testified on direct, I believe, that you normally
5 don't do deals for content you don't own; correct?

6 **A.** Yes.

7 **Q.** So this flurry of side agreements was an unusual situation
8 for Microsoft; correct?

9 **A.** It was.

10 **Q.** I want to turn to the Nintendo agreement. And so
11 I believe this was not under seal, so if it's possible to pull
12 it up. I think it was tab 4.

13 **A.** In my other binder?

14 **Q.** Yes. Apologies.

15 (Pause in proceedings.)

16 **MS. FLEURY:** The exhibit number is RX1212.

17 **BY MS. FLEURY:**

18 **Q.** I want to direct your attention in this agreement to the
19 bottom paragraph on the first page?

20 **A.** Okay.

21 **MS. WILKINSON:** I'm sorry, Your Honor. We just
22 learned from our co-counsel that this should have been sealed.
23 So if I can just ask either to refer to it generally or have
24 just a short closed session. I apologize that I made the
25 mistake.

BOND - CROSS / FLEURY

1 **THE COURT:** Okay. You said it wasn't sealed.

2 **MS. WILKINSON:** I did. I apologize, Your Honor.

3 **THE COURT:** All right. Well, can you direct her
4 attention? I can read it and she can read it.

5 **MS. FLEURY:** Understood. I will do my best.

6 **BY MS. FLEURY:**

7 **Q.** So if you turn to the second Roman numeral where it says
8 "The publishing period," immediately after that it says -- and
9 I think this is --

10 **A.** Okay.

11 **Q.** -- where I will direct you to read starting with the words
12 "Content provider."

13 **THE COURT:** Read to yourself.

14 **BY MS. FLEURY:**

15 **Q.** Read to yourself.

16 **A.** I am.

17 **Q.** Ending at the end of that sentence with "Nintendo
18 platforms."

19 **A.** So it's third paragraph down, number 2? Is that what
20 you're asking me to look at?

21 **Q.** That's right?

22 **A.** Okay.

23 (Witness examines document.) Okay.

24 **Q.** Is that contractual language consistent with Microsoft's
25 other contracts for content?

BOND - CROSS / FLEURY

1 **A.** I don't know if it's precisely the same language. I'd
2 have to -- we just have a lot of contracts, and so I don't know
3 if it's precisely the same.

4 **Q.** Let's turn now to tab 5, which is RX1211.

5 **A.** Okay.

6 **Q.** This is the GeForce NOW Nvidia listing agreement.

7 **A.** I'm here. Is there a section you want me to focus on?

8 **Q.** I'll start by just clarifying.

9 I think you testified on direct you signed this agreement
10 with Nvidia on behalf of Microsoft; correct?

11 **A.** I did.

12 **Q.** But you didn't personally negotiate the agreement with
13 Nvidia; correct?

14 **A.** No.

15 **Q.** You didn't speak with anyone from Nvidia during the
16 negotiation?

17 **A.** No.

18 **Q.** You did have input on the agreement's terms; correct?

19 **A.** Yes, I consulted with the team.

20 **Q.** Microsoft hasn't reached out to any other companies to
21 offer Microsoft's first-party content on similar terms to the
22 Nvidia agreement, has it?

23 **A.** We have some other companies here.

24 **Q.** For those agreements Microsoft's first-party, content the
25 content that it owns separate and apart from the Activision,

BOND - CROSS / FLEURY

1 has Microsoft offered that content to other companies? That's
2 my question.

3 **A.** Yeah, and my understanding is, yes, but there's so many
4 different little nuances. Let me just double-check something.

5 (Witness examines document.) Yes we did. We did.

6 **Q.** And in that particular agreement was it contingent upon
7 the Activision closing?

8 **A.** No.

9 **Q.** In this particular agreement with Nvidia, this is an
10 agreement you could have entered at any time to offer
11 Microsoft's content to Nvidia? There's nothing particular
12 tying it to the Activision acquisition; correct?

13 **A.** No.

14 **Q.** That's not correct?

15 **A.** Sorry. Ask me the question again. I want to -- it's like
16 a double negative. I'm sorry. I'm trying to make sure I
17 understand.

18 **Q.** Understood. I'll reword.

19 **A.** Yeah.

20 **Q.** Microsoft could have offered its first-party content, the
21 content that it owns separate and apart from Activision, to
22 Nvidia at any time; correct?

23 **A.** It could have, yes.

24 **Q.** I'd like you to turn to paragraph 7.4 of RX1211.

25 **A.** 7.4.

BOND - CROSS / FLEURY

1 Q. Let me know when you're there.

2 A. (Witness examines document.) I'm here.

3 Q. This clause is called "Unanticipated and Unforeseeable
4 Future Events." Do you see that?

5 A. I do.

6 Q. It says (as read):

7 "The parties acknowledge that the gaming industry is
8 rapidly evolving and that unanticipated and unforeseeable
9 future events beyond the control of the parties during the
10 ten-year term of this agreement may render performance of
11 the agreement impractical, unduly onerous, or uneconomic
12 for either party."

13 Do you see that?

14 A. I do.

15 Q. So I'm going to specifically ask you about that last part
16 of the clause, and I'm only going to ask you about your
17 commercial understanding of the term.

18 In your view, if either party, Nvidia or Microsoft, does
19 not realize more success because of this agreement at any
20 point, the parties can renegotiate; correct?

21 A. I'm just going to read the language again.

22 (Witness examines document.) That's what this says, yes.

23 Q. And now I'd like you to turn back in the agreement to 2.3.
24 This is on page RX1211-005.

25 A. I'm here.

BOND - CROSS / FLEURY

1 **Q.** And this is entitled "Joint Commitments." It says (as
2 read):

3 "The parties will issue a joint press release
4 announcing an agreement to allow" --

5 **MS. WILKINSON:** I have an objection. I need to speak
6 to my co-counsel for a second.

7 (Pause in proceedings.)

8 **MS. WILKINSON:** Your Honor, Mr. Kilaru is telling me
9 you ruled on this this morning and said it could remain under
10 seal under a different document number. So if that was my
11 error, but I --

12 **THE COURT:** Well, this paragraph A that she's
13 referring to is referring to a past event. Can you tell me why
14 that particular paragraph needs to be under seal? And he can
15 come forward and speak.

16 **MS. WILKINSON:** Yeah.

17 (Pause in proceedings.)

18 **MS. WILKINSON:** Which paragraph?

19 **THE COURT:** She's referring to 2.3A; correct?

20 **MS. FLEURY:** Thank you, Your Honor.

21 **MR. KILARU:** I'm mistaken. I thought it was C,
22 Your Honor, not A. We're reading A?

23 **THE COURT:** We're in A.

24 **MR. KILARU:** Okay. Then I apologize.

25 **THE COURT:** You may go ahead.

BOND - CROSS / FLEURY

1 **BY MS. FLEURY:**

2 **Q.** So 2.3 says (as read):

3 "The parties" -- which here is Microsoft and Nvidia;
4 correct?

5 **A.** Yes.

6 **Q.** (as read):

7 -- "will issue a joint press release announcing an
8 agreement to allow Microsoft's games to be accessed on
9 GFN" -- which stands for GeForce NOW; correct?

10 **A.** Yes.

11 **Q.** (as read):

12 -- "including references to the agreement's term and
13 scope of games to be included on either Monday,
14 February 20th, 2023, or Tuesday, February 21st, 2023.
15 Final day to be determined by Microsoft."

16 Do you see that?

17 **A.** I do.

18 **Q.** Is this kind of requirement to issue a joint press release
19 about the agreement a typical contractual term in agreements
20 for content?

21 **A.** Sometimes we do put this in contracts.

22 **Q.** Stepping away from the terms of this specific Nvidia
23 agreement, I have a different question. Microsoft's counsel
24 referred to another agreement entered into by Nvidia and
25 Microsoft on the same day as this agreement; correct?

BOND - CROSS / FLEURY

1 **A.** Yes.

2 **Q.** You were not the signatory of that agreement; correct?

3 **A.** No.

4 **Q.** I'd like to show it to you. I believe it is in your
5 binder as 1784.

6 **A.** Do you know what tab it's in?

7 **Q.** It was a late addition, so I do not know.

8 **A.** Okay. I'll look around.

9 **THE COURT:** Toward the back. Not that one.

10 **MS. FLEURY:** It was not added by me so I do need to
11 check on confidentiality.

12 **THE COURT:** Okay.

13 **MS. WILKINSON:** It is under seal, Your Honor. I think
14 because this was the first day we did this, we had some
15 different exhibit numbers, which has caused some of the
16 confusion, but that is under seal.

17 **MS. FLEURY:** Okay. I will not read aloud from this
18 document, but I will ask you some questions about it.

19 **THE COURT:** Okay. Let me just say because the
20 representation is that it's a confidential agreement?

21 **MS. WILKINSON:** Correct, Your Honor.

22 **THE COURT:** Okay.

23 **THE WITNESS:** Could you just direct me a little bit
24 more precisely where to find it? Especially because I do have
25 to read it and I didn't negotiate it, so I'm really flying

BOND - CROSS / FLEURY

1 blind.

2 **BY MS. FLEURY:**

3 **Q.** I believe you should look for the tab that says PX1784.

4 **A.** Okay.

5 **Q.** I'm going to guess it's at the back.

6 **A.** Yep, I'm looking.

7 (Witness examines document.) I found 1784.

8 **Q.** And this is a short agreement, but rather than reading the
9 entire thing, especially under the circumstances, I'm going to
10 start by asking you a couple of general questions.

11 **A.** Okay.

12 **Q.** You need a Windows license to stream PC games; correct?

13 **A.** No.

14 **Q.** You do not?

15 **A.** You can stream PC games without a Windows license.

16 **Q.** This agreement involved a license for Windows; correct?

17 **A.** That was my understanding.

18 **Q.** And Microsoft owns Windows; correct?

19 **A.** It does.

20 **Q.** And this agreement, as we've discussed, was entered into
21 separately but on the exact same day as the other agreement
22 with Nvidia; correct?

23 **A.** Yes.

24 **Q.** Ms. Bond, you testified on direct that there are currently
25 some challenges with cloud gaming because of latency; correct?

BOND - CROSS / FLEURY

1 **A.** Correct.

2 **Q.** But you also testified that Microsoft has entered into an
3 agreement with Nvidia to enable Xbox players to stream games
4 from the cloud using Nvidia's service; correct?

5 **A.** Yes.

6 **Q.** You do not have any concerns about the quality of the
7 cloud gaming experience on Nvidia's GeForce NOW; correct?

8 **A.** It was Nvidia's view that this was desirable to them and
9 so we entered into the agreement on that basis.

10 **Q.** I understand. But you personally, Ms. Bond, do not have
11 any concerns about the quality of the cloud gaming experience
12 on Nvidia's GeForce NOW; correct?

13 **A.** I personally have not done diligence to come to my own
14 conclusion on that.

15 **MS. FLEURY:** I move to admit PX1784.

16 **THE COURT:** Any objection? I think you referred to it
17 on direct, so...

18 **MS. WILKINSON:** I'm sorry, Your Honor. I was reading.

19 **THE COURT:** 1784 is the addendum, Nvidia addendum.

20 **MS. WILKINSON:** Yes, that is under seal.

21 **THE COURT:** That's fine, under seal. So it will be
22 admitted under seal.

23 (Trial Exhibit 1784 received in evidence.)

24 **THE COURT:** We usually take an afternoon break for the
25 court reporter. Is now a good time?

BOND - REDIRECT / WILKINSON

1 **MS. FLEURY:** Now is a great time.

2 **THE COURT:** Okay. We'll do that. A 15-minute break.

3 Thank you.

4 (Recess taken at 2:01 p.m.)

5 (Proceedings resumed at 2:15 p.m.)

6 **THE CLERK:** Remain seated. Come to order.

7 **THE COURT:** Okay. We can resume with the cross.

8 **MS. FLEURY:** Your Honor, we pass the witness.

9 **THE COURT:** Oh, okay.

10 (Pause in proceedings.)

11 **MS. WILKINSON:** I believe if you let us, Your Honor,
12 we will be done for the day very soon.

13 **THE COURT:** Well, you only told me you had three
14 witnesses so...

15 **MS. WILKINSON:** That's true, and we have FTC as well.

16 **REDIRECT EXAMINATION**

17 **BY MS. WILKINSON:**

18 **Q.** I just want to clarify a few points, Ms. Bond.

19 In the xCloud streaming service you provide, do you use
20 Azure, the Microsoft cloud product?

21 **A.** No.

22 **Q.** Just briefly what is Azure?

23 **A.** Azure is a cloud service that Microsoft provides to other
24 companies.

25 **Q.** Okay. Your streaming service is called xCloud?

BOND - REDIRECT / WILKINSON

1 **A.** Yes.

2 **Q.** So explain to us why you don't use Microsoft's cloud to
3 stream Xbox games?

4 **A.** So the games we are streaming are console games. They are
5 built using the dev kit we talked about with the console
6 operating system and system architecture so they can only be
7 streamed from consoles.

8 So at the simplest form, what we did when we created
9 xCloud is we took off the plastic cover and we took the -- that
10 piece of hardware and we put it in the cloud.

11 **Q.** You put it in a data center?

12 **A.** Put it in a data center, yeah.

13 **Q.** And so there's Azure equipment in the data center?

14 **A.** Uh-huh.

15 **Q.** Then there's Xbox?

16 **A.** Xboxes sitting in racks in the data center.

17 **Q.** Okay. And the fact that you have to use the Xbox console
18 to stream, does that affect the costs and/or profits of
19 streaming?

20 **A.** It's absolutely a factor, yes.

21 **Q.** Can you explain generally, without going through the
22 numbers, why that is?

23 **A.** Well, that hardware has a particular cost to acquire and
24 then there's a cost of running it and then there's the cost of,
25 like, the data stream kind of going from your phone to the data

BOND - REDIRECT / WILKINSON

1 center and back.

2 **Q.** And if that Xbox were in the hands of an individual, you
3 would also get the benefits of the gaming revenue, and you're
4 not getting that when it's -- or are you getting that when it's
5 in the data center?

6 **A.** We do get it. We get revenue from it, but the -- when we
7 look at all the numbers, the revenue we get, you know, per
8 minute, per hour from that is lower than the cost we get per
9 minute or per hour of that.

10 **MS. WILKINSON:** That's all we have, Your Honor.

11 **THE COURT:** Anything further?

12 **MS. FLEURY:** No, Your Honor.

13 **THE COURT:** Well, I guess we shouldn't have taken that
14 break.

15 Okay. Ms. Bond, you may step down.

16 And I want to thank the FTC for allowing the Defendants to
17 call Ms. Bond out of order.

18 All right. So that concludes us today. So tomorrow see
19 if you can have your witnesses available to go to 3:00 p.m.,
20 but I know we have all been running on an expedited basis and
21 we're feeling things out.

22 I will see you at 8:15 a.m. And, again, if you could
23 today provide us with the list of your witnesses and exhibits
24 because that's really helpful for me to go through as to the
25 confidentiality and by 4:00 o'clock or earlier, given we

BOND - REDIRECT / WILKINSON

1 finished early, provide Ms. Means jointly the admitted
2 exhibits, except for those in camera, the admitted exhibits and
3 those few that were just redactions that needed to be so that
4 we could put them up publicly.

5 All right. Thank you.

6 (Proceedings adjourned at 2:19 p.m.)

7 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, June 22, 2023



Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter